

The Case for Settlement Counsel

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I. OVERVIEW

A. *Too Soon Old, Too Late Smart*

Over my first ten years as a lawyer handling civil litigation I noticed that in many of my cases the first serious settlement discussions took place shortly before trial. This was not good. When I am getting ready for trial, the last thing I want to do is to talk settlement. I have always felt a visceral incompatibility between final trial preparation and meaningful settlement discussions. It seemed that there ought to be a way to find out sooner if the case really needed to be tried. However, I found a perplexing resistance to early settlement discussions—in opposing counsel, in my clients, and in myself.

Then I got involved in litigation in the United Kingdom and a light went on. There, traditionally, solicitors handle settlement discussions and “quarterback” the case, calling in the barrister as needed for pleadings, arguments, and trial. This gives both barristers and solicitors a single-minded efficiency in carrying out their respective duties. I saw that lawyers in the United States could achieve that same one-mindedness if a lawyer other than the trial lawyer—i.e., separate settlement counsel—were given the task of handling settlement discussions, either before litigation starts, or as it proceeds. Over the last nine or so years of my practice, I have tried, in various ways and with varying degrees of success, to separate responsibility for settlement from responsibility for trial.

This Article urges that use of settlement counsel is both wise and workable.¹ I use the term “settlement counsel,” rather than the equivalent, and

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¹ While doing research for this Article, I found that the idea of using separate settlement counsel has been advanced before. See generally Roger Fisher, *He Who Pays the Piper*, HARV. BUS. REV., Mar.–Apr. 1985, at 150, 155–157; Roger Fisher, *What About Negotiation as a Specialty?*, 69 A.B.A. J. 1221, 1223 (1983) [hereinafter Fisher, *What About Negotiation*]; see also Gary Mendelsohn, Note, *Lawyers as Negotiators*, 1

more prevalent, "ADR counsel" because I want to emphasize the *goal*—early settlement, rather than the *method*—Alternative Dispute Resolution (ADR). The underlying premises are the following: (1) the optimal result in a legal dispute can often be achieved by resolving the dispute before litigation commences, or at least before it proceeds through full discovery; (2) the initial attempt to settle has a greater chance of success if made by separate settlement counsel; (3) the greatest benefits are likely if settlement counsel is not a member of the same firm as trial counsel; and (4) in appropriate cases, the benefits of employing settlement counsel will outweigh the costs even if settlement is not reached at the outset of litigation and trial counsel must be called in.

I have several goals in writing this Article, other than encouraging the use of settlement counsel as a method of dispute resolution. First, I want to synthesize some of the best insights from the extensive literature on legal dispute resolution. Second, I want to give substance to terms which appear in the literature, sometimes without much explanation—terms such as "the prevailing legal culture" and "the lawyer's standard philosophical map." The lawyers who inhabit scholarly publications are frequently two-dimensional creatures, with characteristics conducive to the author's argument. They have little to do with the flesh and blood lawyers I have encountered over the past twenty years. A fuller appreciation of the complexities lawyers face should help generate better models and better solutions to the problems of designing dispute resolution systems.

Finally, the view that lawyers are part of the problem with the legal system, if not the entire problem, has become prevalent. The consequent vilification of lawyers has distracted us as a society, by design or not, from some of the fundamental problems with the way we deliver legal services.² It

HARV. NEGOTIATION L. REV. 139, 148–167 (1996) (arguing that a pure negotiator has advantages over a litigator in overcoming certain barriers to settlement).

² On April 28, 1998, a story on the front page of the business section in the *Boston Globe* trumpeted the vitality of the nation's economy. It noted stock market jitters caused by Federal Reserve worries that "there is too much good news coming out of the US economy." Charles Stein, *Dow Dives of Fear of Rate Hike*, BOSTON GLOBE, Apr. 28, 1998, at D1. An accompanying Associated Press story noted that "Americans' incomes surged at more than double the inflation rate last year." *Growing Incomes, Falling Prices Mean More Purchasing Power*, BOSTON GLOBE, Apr. 28, 1998, at D16.

In the Metro section the same day, it was reported that, despite overflowing state coffers, three out of five low income people who seek help in civil matters from Massachusetts's legal services groups are turned away. The reason: lack of resources. See Scott Lehigh, *3 of 5 Are Denied Aid in Civil Law Despite Surplus, State Falls Short*, BOSTON GLOBE, Apr. 28, 1998, at B1. It is intriguing that at a time when legal services are

has also made it more difficult for lawyers to participate in the dialogue that must occur if progress is to be made. I hope by presenting a more balanced view of lawyers in dispute resolution to stimulate that dialogue.

B. Summary of the Argument

Clients, courts, and the public yearn for a less adversarial approach to dispute resolution. Lawyers are frequently blamed for the current state of affairs. However, lawyers are, for the most part, reacting rationally and in good faith to existing incentives and expectations. The current approach imposes a duty on lawyers to resolve cases quickly, while ignoring the real constraints on settlement and incentives to delay resolution.

The constraints are of several sorts. One is our view of how lawyers resolve disputes. Some people see lawyers romantically—as knights in shining armor, or as hired guns. Others see them realistically, using the litigation process to try to pound opponents into a favorable settlement. But each of these models has elements that make it difficult to settle cases quickly. Conversely, the model of the lawyer as a problem-solver, which could encourage efficient resolution, is neither as clearly defined nor as widely known.

Aside from the fact that problem-solvers are breaking new ground, there are significant incentives for lawyers not to embrace early settlement. These incentives include the need to market services, the desire not to appear weak, the obligation to represent a client zealously, the thirst for justice, and last, but perhaps not least, the desire to maximize income. In addition, it is extremely difficult, psychologically, for an attorney to act as an effective advocate and, at the same time, to encourage settlement. In the face of these obstacles, a poorly defined and toothless “duty to settle” is not likely to bring about the behavior which critics seek.

When a lawyer is hired for the sole purpose of determining if a fair resolution is possible without litigation—i.e., to act as settlement counsel—the lawyer’s interests are aligned with the goal of achieving early settlement. Settlement counsel should be in a better position to use interest-based bargaining techniques and should be better able to avoid some of the common obstacles to early settlement. Because settlement counsel is encouraged to use “value-creating” techniques before “value-claiming” begins, the prospect of early settlement should improve.

beyond the reach of even many middle-income persons, the primary focus of concern with the legal system is excessive litigation.

There are potential disadvantages to the use of settlement counsel, most notably the risk of increased cost if the case is not settled. However, there are ways to minimize the increased costs. In addition, there may be benefits from using settlement counsel which outweigh any additional costs. For example, overall litigation costs may be reduced as a result of focusing on the important issues, reducing the need for formal discovery, diminishing the demonization of the other side, and establishing realistic reference points which will facilitate later settlement efforts. The real promise of settlement counsel, however, is in promoting early settlement.

II. THE ELUSIVE GOAL OF EARLY SETTLEMENT

There is tremendous pressure on the legal profession to avoid litigation. Sometimes the focus is on "frivolous" suits—suing over hot coffee. The concern here is with a different problem—delay in settlement. While about ninety percent of civil cases settle before trial,³ there is widespread dissatisfaction with the amount of time and money spent before the cases are resolved.⁴ The public image of lawyers has taken a beating. Since the 1976 Pound Conference, lawyers have been singled out as the primary cause of the litigation explosion.⁵ While judges and academics have pointed criticisms to make, the true measure of public venom is better gauged by watching Leno or Letterman.

At the same time, some progress has been made in use of alternative dispute resolution. Every year, the CPR Institute for Dispute Resolution

³ See Mary J. Davis, *Summary Adjudication Methods in United States Civil Procedure*, 46 AM. J. COMP. L. 229, 229 & n.2 (1998) (noting that 85% to 95% of all civil cases settle before proceeding to trial). This figure has been consistent over the past 15 years. See GERALD R. WILLIAMS, *LEGAL NEGOTIATION AND SETTLEMENT* 1 (1983) (noting that 90% of civil cases settle before trial).

⁴ See, e.g., CHIEF JUSTICE'S COMM'N ON THE FUTURE OF THE COURTS, MASSACHUSETTS SUPREME JUDICIAL COURT, *REINVENTING JUSTICE 2022*, at 18 (1992) (stating that more than 4 in 10 survey respondents identified "caseload too full/too crowded" and "process too slow" as major problems facing courts); KENNETH J. THYGERSON, *CONTROLLING CORPORATE LEGAL COSTS: NEGOTIATION AND ADR TECHNIQUES FOR EXECUTIVES* 49 (1994); Samuel Issacharoff et al., *Bargaining Impediments and Settlement Behavior*, in *DISPUTE RESOLUTION: BRIDGING THE SETTLEMENT GAP* 51, 51-52 (David A. Anderson ed., 1996).

⁵ See Issacharoff et al., *supra* note 4, at 51; Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood*, 11 OHIO ST. J. ON DISP. RESOL. 297, 310-313 (1996).

reports slow, but steady, growth in the use of ADR.⁶ The growth of contractually mandated ADR contributes to the push for early resolution. In particular, recent changes to the widely used form contracts published by the American Institute of Architects portend more mediation of construction disputes.⁷ The primary public response to the litigation "nightmare" has been to foster court-sponsored ADR programs, generally held at around the time of the pretrial conference.⁸ While resolution at this point avoids the public

⁶ See *Briefs: Surveys Show Increasing ADR Use*, 15 ALTERNATIVES TO HIGH COSTS LITIG. 85, 85 (1997).

⁷ Section 4.5.1 of the 1997 edition of American Institute of Architects (AIA) Document A201 provides that "[a]ny Claim arising out of or related to the Contract . . . shall . . . be subject to mediation as a condition precedent to arbitration or the institution of legal or equitable proceedings by either party." GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION DOC. A201 § 4.5.1 (American Institute of Architects 1997). The A201 is the standard form of general conditions incorporated into construction contracts. Similar language appears in § 1.3.4 of AIA Document B141, the standard form agreement between owner and architect. See GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION DOC. B141 § 1.3.4 (American Institute of Architects 1997).

⁸ See David S. Winston, *Participation Standards in Mandatory Mediation Statutes: "You Can Lead a Horse to Water . . ."*, 11 OHIO ST. J. ON DISP. RESOL. 187, 187-189 (1996). One commentator has referred to Frank Sanders's "multi-door courthouse" concept as the "unifying ADR initiative," and the "most useful" contribution to emerge from the seminal 1976 Pound Conference. Stempel, *supra* note 5, at 324. The 1976 Pound Conference in St. Paul, Minnesota is widely seen as the "birth" of the modern ADR movement. See *id.* at 309. Then-Chief Justice Warren Burger was the driving force of the Conference, see *id.* at 310, and a prominent proponent of the view that the litigation explosion was the result of overly contentious lawyers who needed to be controlled. See *id.* at 311-313 & n.45.

Court-sponsored ADR takes various forms, both as described in the Winston article, see generally Winston, *supra*, and in my personal experience. In the Federal District Court for the District of Massachusetts, Local Rule 16.1 requires each party and each attorney to certify, before the initial scheduling conference, that attorney and client have conferred to consider resolution of the litigation by ADR. Local Rule 16.4 requires judges and magistrates to "encourage the resolution of disputes by settlement or alternative dispute resolution programs," D. MASS. R. 16.4(A), and to "inquire as to the utility of the parties' conducting settlement negotiations" at every conference, D. MASS. R. 16.4(B). Participation in ADR is not mandatory, and there is no ADR screening conference, as such. See D. MASS. R. 16.4.

In the Superior Court for Middlesex County, in Cambridge, Massachusetts, cases are routinely scheduled for an individual ADR screening conference with the Middlesex Multi-Door Courthouse. Cases in the Superior Court for Suffolk County are screened in a joint session together with other cases; the Massachusetts Office of Dispute Resolution panel of mediators then gives lawyers a presentation and the opportunity to volunteer for mediation.

expense of a trial, it means that the parties will not obtain one of the primary benefits of settlement—avoiding the substantial fees and expenses incurred in discovery and pretrial motions.

Efforts to reduce litigation by court-sponsored ADR have met with only modest success not only because the ADR is introduced so late in the process, but because the planners have given insufficient attention to the lawyer's critical role as "gatekeeper" of the choice to mediate or not.⁹ The result is that, while mediation training has become a growth industry, there is frequently no need for the services of new court mediators. Mediation panels are full and not particularly busy.¹⁰

The blame for the tepid success of ADR is frequently laid at the feet of the lawyers. Corporations with ADR policies report that outside counsel rarely advise mediation, and participate reluctantly, often as a result of a court mandate.¹¹ The 1996 *American Bar Association Journal* survey reported that, while half of lawyers surveyed said they prefer mediation to litigation and arbitration, more than half the respondents said they had not actually participated in any ADR event during the past five years.¹² Typical reasons

See SUPREME JUDICIAL COURT/TRIAL COURT STANDING COMM. ON DISPUTE RESOLUTION FOR THE CHIEF JUSTICE FOR ADMIN. & MANAGEMENT OF THE TRIAL COURT, REPORT TO THE LEGISLATURE ON THE IMPACT OF ALTERNATIVE DISPUTE RESOLUTION ON THE MASSACHUSETTS TRIAL COURT 23-25 (1998). Cases are not scheduled for screening in the Superior Court for Middlesex County until at least 6.5 months after filing. *See id.* at 37. In this Author's experience, ADR screening does not occur until discovery is complete or nearly complete and the case is ready for a final pretrial conference.

⁹ *See* Gary Goodpaster, *Lawsuits as Negotiations*, 8 NEGOTIATION J. 221, 223 (1992); *see also* Stempel, *supra* note 5, at 355.

¹⁰ *See* David A. Hoffman, *President's Column*, SPIDR NEW ENG. UPDATE, Nov. 27, 1998, at 2, 2 (noting the proliferation of training programs for new mediators). Hoffman, the current president of the New England Society of Professionals in Dispute Resolution (SPIDR), continues: "Many of these new mediators have found it difficult to find even volunteer opportunities, leading one very senior mediator in Massachusetts to comment that the proliferation of mediation training programs constitutes a 'serious ethical problem.'" *Id.* at 2; *see also* David Plympton, *Comment: Ethical Duties of Mediation Trainers in the Promotion of Training Programs*, SPIDR NEW ENG. UPDATE, Jan. 6, 1999, at 1, 1 ("In the past 10 years, many newly trained mediators have called me asking about ADR employment opportunities. Incredibly, most have been referred to me by their trainers, who know very well that there are few such opportunities.").

¹¹ *See* Briefs: *Surveys Show Increasing ADR Use*, *supra* note 6, at 85; *see also* *Special Supplemental Proceedings, CPR Institute for Dispute Resolution Spring Meeting*, 14 ALTERNATIVES TO HIGH COSTS LITIG. 98, 98 (1996).

¹² *See* Richard C. Reuben, *The Lawyer Turns Peacemaker*, A.B.A. J., Aug. 1996, at 54, 54-55.

offered for the lack of enthusiasm are greed, lack of skill in negotiation, and a reluctance to try new ways of resolving disputes.¹³ This dovetails neatly with the view that “lawyers foment controversy and prolong litigation because they make money by doing so.”¹⁴

The truth is more complicated. Survey data show that many lawyers (1) want to settle cases sooner; (2) want to use interest-based, rather than positional bargaining;¹⁵ and (3) participate willingly and effectively in

¹³ See THYGERSON, *supra* note 4, at 113; see also *Special Supplemental Proceedings*, *supra* note 11, at 98.

¹⁴ Issacharoff et al., *supra* note 4, at 51.

¹⁵ The terminology used to describe approaches to negotiation is varied and confusing. One basic distinction involves the style of the negotiator. So a “competitive,” adversarial, or hard bargaining style is distinguished from a “cooperative” style. WILLIAMS, *supra* note 3, at 18–19.

In *Getting to Yes: Negotiating Agreement Without Giving In*, “positional” bargaining is distinguished from “principled” bargaining. ROGER FISHER ET AL., *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 10–12 (Bruce Patton ed., 2d ed. 1991). The authors’ focus is on the substance of the discussions rather than the personal style of the negotiator. The authors urge readers to eschew the traditional method of bargaining in which adversaries stake out a position—e.g., a desired settlement amount—and then argue that their position is more reasonable, more realistic, or fairer than the opponent’s position. Do not argue over positions, they say. Instead, focus on interests and collaborate in finding solutions which satisfy the most important interests of all parties, choosing among alternatives based upon shared principles and objective criteria. *See id.*

Principled negotiation is also called “integrative,” “interest-based,” “win-win,” or “problem-solving” bargaining. Gary Goodpaster, *Rational Decision-Making in Problem-Solving Negotiation: Compromise, Interest-Valuation, and Cognitive Error*, 8 OHIO ST. J. ON DISP. RESOL. 299, 299 (1993). Some commentators consider the *Getting to Yes* approach to be a form of cooperative negotiation, see Russell Korobkin & Chris Guthrie, *Opening Offers and Out-of-Court Settlement: A Little Moderation May Not Go a Long Way*, 10 OHIO ST. J. ON DISP. RESOL. 1, 16 n.41, 21 (1994), though Fisher, Ury, and Patton take pains to distinguish principled negotiation from both competitive and cooperative negotiation. *See* FISHER ET AL., *supra*, at 9–14.

Carrie Menkel-Meadow distinguishes between adversarial and problem-solving negotiation, basing her distinction on the goals of the parties. The term adversarial, as she uses it, refers not to the competitive or adversarial style of negotiation, but, more generally, to the traditional “zero-sum” attitude toward negotiation—i.e., maximizing my gain at your expense. Her problem-solving is very close to Fisher, Ury, and Patton’s principled negotiation. *See* Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 764–765, 817–824 (1984).

In this Article, I use the term “cooperative negotiation” to refer to bargaining characterized by willingness to make trade offs and use concessions to induce concessions

mediation programs, even when pressured into mediation by the courts.¹⁶ A survey of about five hundred litigators in New Jersey showed that seventy-nine percent felt that cases should settle sooner.¹⁷ The same survey reported that, though positional bargaining was used entirely, or almost entirely, in seventy-one percent of the cases involved, the lawyers preferred to use more problem-solving techniques.¹⁸ "Sixty-one percent [of the lawyers surveyed] thought that problem-solving negotiation should be used more than it now is."¹⁹

In addition several studies indicate that lawyers do not obstruct efforts to mediate cases, and that they speak favorably of mediation. In a study revealing the experiences of divorce lawyers with mediation, the lawyers proved, contrary to expectations, to be willing and helpful participants.²⁰ A 1990 survey of construction lawyers showed that almost half thought that mediation should be used in most or all construction disputes.²¹ The 1994 Construction Industry Survey on Dispute Avoidance and Resolution shows attorneys prefer mediation over arbitration as a method of dispute resolution.²² A 1996 survey published in the *American Bar Association Journal* reported that fifty-one percent of lawyers surveyed prefer mediation to litigation as a means of resolving disputes, while only thirty-one percent prefer litigation to mediation.²³

A recent study of mediation in three superior court programs in Massachusetts also suggests that lawyers participate willingly, and effectively, in mediation. In fifty percent to eighty percent of mediated cases reported, there was resolution of at least some issues in the case. Middlesex County

by the opponent. I use the term "adversarial" to refer to the style of the negotiator.

¹⁶ See Milton Heumann & Jonathan M. Hyman, *Negotiation Methods and Litigation Settlement Methods in New Jersey: "You Can't Always Get What You Want,"* 12 OHIO ST. J. ON DISP. RESOL. 253, 254 (1997).

¹⁷ See *id.*

¹⁸ See *id.* at 255.

¹⁹ *Id.*

²⁰ See Craig A. McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317, 1364-1365 (1995).

²¹ See Douglas A. Henderson, *Mediation Success: An Empirical Analysis*, 11 OHIO ST. J. ON DISP. RESOL. 105, 129 (1996).

²² See Darrick M. Mix, Note, *ADR in the Construction Industry: Continuing the Development of a More Efficient Dispute Resolution Mechanism*, 12 OHIO ST. J. ON DISP. RESOL. 463, 478-479 (1997).

²³ See Reuben, *supra* note 12, at 54, 56.

reported full settlement in over seventy percent of the cases involved in the study.²⁴ Lawyers said that they participated in mediation not because of pressure from the client but because of their own desire to save their clients' time and money and their feeling that mediation might produce a better result than litigation.²⁵ More than ninety percent of the attorneys surveyed would be willing to try mediation again.²⁶

III. LAWYERS AND SETTLEMENT: HOW MANY BLIND MEN DOES IT TAKE TO DESCRIBE AN ELEPHANT?

One might gather from the literature that there is a discrepancy between what lawyers say they would like to do and what they are actually doing. Cynics might explain this as hypocrisy—lawyers say what they think the public wants to hear, while carrying on business as usual. Those of a more charitable bent might see only human fallibility—we have left undone those things which we ought to have done, and we have done those things which we ought not to have done. But both of these approaches suffer from the same shortcoming as many of the surveys—they assume that all lawyers share common perspectives and common values. Sometimes this assumption has a significant impact on the usefulness of the survey. For instance, the failure to control for the differing interests of plaintiffs' personal injury lawyers working on a contingent fee, insurance defense lawyers paid by salary, and other attorneys working on an hourly rate, diminishes the impact of Heumann and Hyman's very interesting survey of New Jersey lawyers.²⁷

²⁴ See RICHARD J. MAIMAN, *STANDING COMM. ON DISPUTE RESOLUTION OF THE MASS. SUPREME JUDICIAL COURT/TRIAL COURT, AN EVALUATION OF SELECTED MEDIATION PROGRAMS IN THE MASSACHUSETTS TRIAL COURT* 34 (1997).

²⁵ See *id.* at 31.

²⁶ See *id.* at 36. One must use caution in drawing conclusions from the Massachusetts study. In Massachusetts, participation in mediation is voluntary; one would expect that attorneys who choose mediation might be predisposed in its favor. A substantial number of cases were not sent to mediation at the screening. In Middlesex County, 27% of the cases were sent to mediation and 51% were continued for trial; in Suffolk County the respective percentages were 37% and 39%. See *id.* at 25. Lawyers may, or may not, have been instrumental in keeping cases out of mediation.

²⁷ This is the study referred to earlier, see discussion *supra* notes 16–19 and accompanying text, which reports a disparity between attorneys' desire to use problem-solving and their actual use of positional methods. The authors of the study acknowledge that varying financing arrangements may have an effect on approaches to negotiation. See Heumann & Hyman, *supra* note 16, at 292. However, the survey results are reported in

The short answer is that all lawyers cannot be painted with the same brush. Some lawyers do aggressively seek to settle cases. Others do not. But often, when lawyers fail to settle cases early in the process, it is not because they are ignorant or greedy, but because they are smart. The fact is that lawyers are working in a system that provides little incentive to settle cases and many incentives not to do so. Those incentives include not only specific financial and psychological factors, but also the way in which we, as a society, picture the lawyer's role.

A. Five Models of Lawyers in Dispute Resolution

1. Champion

The lawyers we grew up admiring—Clarence Darrow, Atticus Finch, Perry Mason—were all cast from the same mold. The lawyer is a knight in shining armor, who fights the client's fight and bears the client's burden. The Champion believes that disputes are about facts and about securing legal rights. When the parties cannot agree on the facts, they need a neutral forum to adjudicate the facts and declare their rights. The Champion's focus is on resolving the conflict within the familiar confines of the courtroom, by the rules. Champions do not settle cases; they try them.

Using this romanticized model, it can be hard to understand why nine out of ten cases settle before trial. From the Champion's perspective, settlement is an aberration, a failure of the process. It occurs either because the parties come to realize that their view of the facts was in error or because the expense of litigation forces an abortive settlement before justice can be achieved. Early settlement is unlikely, both because settlement is an afterthought and because the facts have not been sufficiently developed to permit an intelligent settlement.

terms of percentages for *all* attorneys, without differentiating between plaintiffs' attorneys and defense attorneys, and without regard for how the attorneys were compensated. *See id.* at 255–256. It would be very interesting to know if plaintiffs' attorneys or defense attorneys predominate among the 47% of attorneys who think that positional bargaining should be used less. *See id.* at 256. It would also be interesting to know whether defense attorneys from outside firms who are compensated at their normal hourly rate have views that differ from those of attorneys who are salaried employees of the insurance companies, who are employees of "captive" law firms, or who work for firms that take insurance work at reduced hourly rates.

2. *Hired Gun*

The Hired Gun is the Champion's evil twin. The goal is to win at all costs and to be compensated accordingly. The Hired Gun does not have the Champion's narrow focus. If a smaller, weaker opponent can be stonewalled until he exhausts his resources and surrenders, so much the better. If critical documents must be overlooked, or even destroyed, as the price of victory, it is a small price to pay. It is this image of the lawyer which, more than anything else, led to the strong-handed approach taken since the 1976 Pound Conference.²⁸ This image, like that of the Champion, can seem a caricature, but in *No Contest: Corporate Lawyers and the Perversion of Justice in America*, Ralph Nader and Wesley Smith provide some vivid examples of the Hired Gun at work.²⁹

The Hired Gun, like the Champion, is interested in facts. But for the Hired Gun, the most important facts are frequently those which he (or his client) knows, but the other side does not.³⁰ The Hired Gun's refusal to discuss settlement is strategic. There will be no serious discussion of settlement until the other side demonstrates both a strong likelihood of success at trial and sufficient resources to overcome determined stonewalling. When bargaining occurs, it is a zero-sum game.³¹ The game is won or lost depending on the attorney's ability to convince the other side what the court will do, given the facts elicited in discovery. Early settlement is unlikely because only after discovery will one know whether the other side will be able to prove its case. More importantly, to seek early settlement is to give up the opportunity to achieve complete victory with steamroller tactics.

²⁸ See *supra* note 8 (discussing the Pound Conference).

²⁹ See RALPH NADER & WESLEY J. SMITH, *NO CONTEST: CORPORATE LAWYERS AND THE PERVERSION OF JUSTICE IN AMERICA* 3-59 (1996).

³⁰ I have tried, wherever possible, to avoid gender-specific pronouns. Where I could not find an acceptable work-around, I have resorted to alternating use of the masculine and the feminine pronouns. I intend both to be understood as inclusive of the other.

³¹ A zero-sum game is defined as one in which the gains of one party equal the losses of the other. To use a familiar analogy, in a zero-sum game the parties have a pie with a fixed size; the only question is who will get the bigger piece. When parties view their situation as zero-sum, they are likely to litigate, not settle. See Goodpaster, *supra* note 9, at 222-223.

3. *Litigator*

In his 1992 article, *Lawsuits as Negotiations*,³² Gary Goodpaster draws a gritty picture of the way in which lawyers actually work. In his view, it is not surprising that so many cases settle. That is what the parties, and their lawyers, really intended from the outset.³³ Litigation is an effective tool in the negotiator's toolbox. These lawyers do not seek trial; they are Litigators, not trial lawyers. The goal is to pummel the other side into a favorable settlement posture. Litigation is valuable *precisely because of* the delay, expense, and pain it involves.

With the ongoing cost of litigation, the zero-sum game is transformed into a negative-sum game.³⁴ This leads to a "hurting stalemate" in which a negotiated resolution is likely.³⁵ In essence, the Litigators see that their original strategy of using the litigation to force a favorable settlement has failed, and the goal now becomes to end the dispute on the best possible terms. Unfortunately, the "best possible terms" just before trial may leave the client in a worse net position than a settlement which could have been attained before litigation started.

With the Litigator, settlement barriers are not so much strategic as tactical. The Litigator really wants to settle, but use of litigation as a negotiation tool amplifies all of the communication and psychological barriers to settlement.³⁶ Early settlement is not likely given the plan to use the delay and cost of litigation to extract concessions.

Goodpaster's model of litigation as negotiation does not apply to all lawsuits but is a jarringly accurate description of at least part of what occurs in many cases. It is not a pretty picture. In his view, litigation is neither a

³² See Goodpaster, *supra* note 9.

³³ See *id.* at 236.

³⁴ To return to our pie analogy, litigation is a negative-sum game because, while the parties argue over who gets the biggest piece, the lawyers are busy eating the pie.

³⁵ See Dean G. Pruitt & Paul V. Olczak, *Beyond Hope*, in CONFLICT, COOPERATION & JUSTICE 59, 68-71 (Jeffrey Z. Rubin ed., 1995). A hurting stalemate occurs when both parties perceive that further gains are not possible and that costs are persistent or rising. Strictly speaking, further gains are possible in litigation, because either side can win at trial. But where the outcome is uncertain, the parties may doubt that there will be any gains. See *id.*

³⁶ See Robert H. Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 OHIO ST. J. ON DISP. RESOL. 235, 241 (1993); Lee Ross & Constance Stillinger, *Barriers to Conflict Resolution*, 7 NEGOTIATION J. 389, 389-409 (1991).

joust between two knights, nor a gunfight in the Old West. It is, rather, World War I trench warfare. The public shares this perception and reacts with revulsion to the enormous waste of time, money, and emotional energy.

4. *Healer*

Gerald Williams has articulated a view of negotiation, and of the lawyer's role in negotiation, which suggests that the expense and stress of litigation can achieve resolution of conflict in positive ways.³⁷ In Williams's view, negotiation is a ritual process which can, and in ideal circumstances will, transform the lives of the parties. There is a clear parallel to Bush and Folger's transformative mediation,³⁸ and substantial overlaps with Shaffer and Cochran's notion that the lawyer and client engage in moral discourse.³⁹ The lawyer, in this model, is a Healer who guides the client through a transformative process.

One of the key steps in the process Williams describes is a "sacrifice" by means of "ritual mortification."⁴⁰ The very elements by which the Litigator seeks to impose his will upon the other party—legal fees and other expenses, answering interrogatories, gathering documents, undergoing a deposition—

³⁷ See Gerald R. Williams, *Negotiation as a Healing Process*, 1996 J. DISP. RESOL. 1, 3-4.

³⁸ See generally ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION* (1994). The settlement counsel thesis can be stated quite succinctly, using Bush and Folger's concepts of empowerment and recognition. Settlement is a by-product of a process which involves alternating patterns of empowerment (appreciation of one's own strength and ability to deal with problems) and recognition (acknowledgment of and empathy for the situation and problems of the other party). See *id.* at 2-3. People generally must feel empowered before they can give recognition. One route to immediate empowerment is to hire a lawyer, an expert in conflict, as an agent.

However, if the other side also hires a lawyer, the balance of power is restored, and now *the lawyers themselves* must feel empowered before they can give recognition on behalf of their principals. For trial lawyers, empowerment comes from thorough investigation of facts and analysis of relevant law, to achieve confidence of victory at trial. This results in substantial delay and expense before recognition can be introduced into settlement discussions.

Attorneys acting as settlement counsel can begin the alternation of empowerment and recognition sooner, both because they understand the importance of giving recognition and because, with a broader, problem-solving focus, victory at trial is not the sole issue.

³⁹ See THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., *LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY* 46 (1994).

⁴⁰ Williams, *supra* note 37, at 49.

enable the Healer's client "to see their own role in the conflict more clearly, and open up the possibility of an appropriate, mutually agreeable resolution."⁴¹ As Williams portrays it, the Healer is not simply the masochist to the Litigator's sadist. Rather, both the stronger party and the weaker are transformed, and benefit thereby, because each is less likely to become involved in similar conflicts in the future, to the extent the conflict was caused by or exacerbated by the party's own "developmental shortcomings."⁴²

Unlike the Champion and the Hired Gun, and like the Litigator, the Healer seeks settlement. The Healer, moreover, seeks settlement not just to end the conflict, but to resolve it, that is, to reach a mutually agreeable resolution which will minimize residual negative effects and consequent noncompliance or recurrence. However, because the Healer sees conflict resolution as a ritual with several distinct stages, early settlement may not be likely. Indeed, because the goal is deep, personal transformation, early settlement may not be desirable.

5. Problem-Solver

There is another model of the lawyer in dispute resolution, one which is gaining in popularity,⁴³ but which has not captured people's imagination like the Champion or the Hired Gun. Where the Healer sees an opportunity for moral growth, this lawyer sees a problem to be solved.⁴⁴ Facts and rights may

⁴¹ *Id.*

⁴² *Id.* at 56.

⁴³ In 1984, while the conception of problem-solving negotiation was not new, it was an approach rarely advocated by lawyers. *See* Menkel-Meadow, *supra* note 15, at 757-758 & n.5. By 1997, a substantial number of lawyers were expressing a preference for problem-solving, though few practiced it. *See* Heumann & Hyman, *supra* note 16, at 255. The American Bar Association noted the trend towards mediation and problem-solving in an *American Bar Association Journal* cover story entitled *The Lawyer Turns Peacemaker*. *See* Reuben, *supra* note 12, at 55.

⁴⁴ The tension between transformation and problem-solving is explored at length in *The Promise of Mediation*. *See* BUSH & FOLGER, *supra* note 38. Bush and Folger's argument is provocative, and they are correct in identifying an important element in what mediation does best. However, they go astray in presenting transformative mediation as a response to conflict which is inherently and morally superior to problem-solving.

First, they understate the problem of mediator influence. There is no reason to believe that transformative mediators will be any less directive in forcing recognition than problem-solving mediators are in imposing solutions.

Second, their approach is truly empowering only if the parties themselves seek moral growth, rather than a solution to an immediate and vexing problem. Imagine that the parties

or may not be important. What *is* important is to identify the goals and interests of the client and the opponent as efficiently as possible and to devise satisfactory solutions to the problem based on those goals and interests. Litigation may be an alternative, but it is not a tool, because it is usually counterproductive to the Problem-solver's methods.

The model of lawyer as problem-solver is not clearly defined.⁴⁵ There are no rules of civil procedure, little case law, and few war stories to guide the problem-solving attorney. While there is a rich literature on problem-solving negotiation,⁴⁶ no clear image of the lawyer doing problem-solving emerges. The negotiation literature is not written primarily for attorneys and frequently warns that the attorney's customary approach to problems must be unlearned.

Part of the difficulty attorneys have in adapting to interest-based bargaining may be precisely that they have no place of honor at the table. And worse, not only is the literature not written *for* lawyers, it is frequently written *about* lawyers, as if they are some sort of specimen on a entomologist's needle. The social science literature is often not helpful to a lawyer trying to resolve a real dispute. Instead, we find inscrutable mathematical formulas or charming fables about oranges or cakes.⁴⁷

The unfamiliarity of the model of lawyer as problem-solver may provide a partial explanation why early settlement is difficult to achieve. But it is far from a complete explanation. The question still remains: Why is it that so many lawyers follow the path of the Champion, the Hired Gun, or the

to a dispute are faced with a choice between two mediators. The first promises to help them work on their capacities for empowerment and recognition, with settlement as one possible, but essentially unimportant, by-product of the process. The second promises to help them, flawed as they are, to end the dispute by seeking a mutually agreeable outcome. I suspect that most people would choose the problem-solver.

The danger is that transformative mediators, buoyed by a sense of moral superiority, will impose upon the parties not a solution but an approach to conflict which may impede the solution that the parties really want.

⁴⁵ I do not want to suggest that there is always a bright line distinguishing the other models. The Hired Gun, when faced with a tough opponent, will frequently shift to a "grind-it-out" Litigator style. For a client, the distinction between a Champion and a Hired Gun may turn on whether she is your lawyer, or the opponent's.

⁴⁶ See, e.g., Goodpaster, *supra* note 15; Menkel-Meadow, *supra* note 15, at 755 n.1.

⁴⁷ The familiar story about the parent who interrupts two children fighting over an orange, and discovers that one wants only the peel while the other only wants the juice, does illustrate very nicely the value of exploring the needs and interests of the parties. In a real conflict, the difficulty lies not in understanding the principle, but in applying it in the heat of an immediate conflict in which the actual needs and interests of the parties are complicated and not easily discernible.

Litigator rather than the Problem-solver? Why is it that the competitive, positional bargaining associated with the other models is so prevalent? Is it, as some suggest, that greedy lawyers do not really want to resolve disputes until just before trial? While financial self-interest may be a factor in some cases, the answer is more complex, and has to do with the two-edged sword of "toughness."

B. *The Lure of Toughness*

The dirty little secret of much of the interest-based bargaining literature is that toughness works—sometimes. A number of studies have shown that use of a tough negotiating style can get the best results for clients in positional bargaining.⁴⁸ Hard bargaining works best when the negotiator for the other side is using concessions to induce cooperation. Hard bargaining also avoids making unwise concessions, not because it requires an understanding of what concessions would be unwise, but because the essence of the strategy is to make no concessions (or at least minimal concessions). Hard bargaining, however, has risks—it frequently leads to impasse.⁴⁹ This sometimes occurs when the other side is strong and decides to fight fire with fire. It also occurs when the other side is weak and refuses to capitulate to attempted domination.⁵⁰

⁴⁸ See WILLIAMS, *supra* note 3, at 48; see also Korobkin & Guthrie, *supra* note 15, at 2–4.

⁴⁹ See WILLIAMS, *supra* note 3, at 49–50. In several interesting experiments, Korobkin and Guthrie demonstrate that, in some situations, the contrary may be true—extreme opening offers may encourage settlement, while moderate opening offers can actually diminish the chances of eventual settlement. To explain, they point to the psychological phenomena of "anchoring" and "cognitive dissonance." Anchoring occurs when the extreme opening offers create an expectation in the other side about the value of the case or create a benchmark by which the other side measures its progress in the negotiations. Cognitive dissonance is the unpleasant experience of having contrary opinions about an issue. Therefore, a moderate initial offer, once rejected, becomes harder to accept. See Korobkin & Guthrie, *supra* note 15, at 18–21.

⁵⁰ The studies of "ultimatum bargaining" illustrate this point. In this type of experiment, a man might be given five dollars and told to divide it between himself and another person in any manner he chooses. The second person must then decide to accept or reject the proposed allocation. If it is rejected, neither person gets anything. While, from a purely rational point of view, the second person is better off taking any amount at all, offers of substantially less than half of the total are generally rejected. See Issacharoff et al., *supra* note 4, at 56; Korobkin & Guthrie, *supra* note 15, at 5 n.24 (citing ROBERT H. MNOOKIN & LEE ROSS, INTRODUCTION TO BARRIERS TO CONFLICT RESOLUTION (1995)).

It has been pointed out that a client deciding whether to hire a lawyer to resolve a dispute faces a Prisoner's Dilemma.⁵¹ A lawyer, planning the initial litigation strategy, faces a similar dilemma.⁵² The lawyer making the initial contact about the dispute, not knowing how the other side will act, may in good faith conclude that toughness, perhaps even intimidation, is the best approach even though chances of a prompt settlement (which may be the best result for both sides) are diminished.

⁵¹ See Jeff Hawkins & Neil Steiner, *The Nash Equilibrium Meets BATNA: Game Theory's Varied Uses in ADR Contexts*, 1 HARV. NEGOTIATION L. REV. 249, 251 (1996). The Prisoner's Dilemma is a construct used by social scientists to illustrate how individuals faced with a choice whose consequences depend upon the independent, but unknown, choice of another individual may rationally choose a course of conduct that results in a less than optimal result. The construct involves a series of decisions to cooperate or compete, with the highest mutual benefit if both parties cooperate, but the highest individual benefit if one chooses to compete while the other side chooses cooperation. Correspondingly, the lowest individual benefit occurs if one chooses to cooperate while the other chooses competition. If both parties compete, each receives less than she would if both cooperated, but more than she would if she cooperated while the other competed. The Prisoner's Dilemma is usually illustrated as follows:

		Player B's Choice	
		Cooperate	Compete
Player A's Choice	Cooperate	Both get 10	A gets 3 B gets 15
	Compete	A gets 15 B gets 3	Both get 5

Each party, not knowing what the other may do, could rationally elect to compete, to avoid getting only 3 to the other party's 15. As a result each party may end up with 5, though mutual cooperation would result in each party having a payoff of 10.

Additional information about the Prisoner's Dilemma may be found online at Jonathan Blumen, *The Prisoner's Dilemma: Sources* (visited Mar. 12, 1999) <<http://www.spectacle.org/995/source.html>>. One can play an iterated Prisoner's Dilemma game against a computer at *You Have Found the Prisoners' Dilemma* (visited Mar. 12, 1999) <<http://sernedip.brynmawr.edu/~ann/pd.html>>.

⁵² See DAVID A. LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN* 158-164 (1986); Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 514-516 (1994).

One recent study noted lawyers' expressed preference for problem-solving negotiation despite their almost exclusive reliance on positional bargaining.⁵³ The study found that while sixty-one percent of the lawyers surveyed indicated that they would like to see more problem-solving, the lawyers actually used the positional method in seventy-one percent of their cases.⁵⁴ The authors concluded that a Prisoner's Dilemma provided the best explanation for the paradox, but felt that given the ongoing communication in most settlement discussions, lawyers should be able to avoid the dilemma.⁵⁵ That is, by expressing their preference for the problem-solving style, lawyers should be able to induce the opponent to use that style as well, if the opponent is one of the sixty percent who prefer problem-solving. The authors concluded that habit, or as they put it, using Leonard Riskin's phrase, the lawyer's "standard philosophical map"⁵⁶ combined with a lack of the language required to switch to problem-solving⁵⁷ explain the failure to escape the dilemma.⁵⁸

Whatever the explanation for failure to use problem-solving bargaining over the long haul, the Prisoner's Dilemma provides insight into lawyers' failure to use problem-solving initially. And, because competitiveness begets competitiveness, the initial approach tends to establish the tone of negotiations in the early stages of the dispute. If the prelitigation opportunity is missed, it may be months before serious settlement discussions resume. In addition to the insights into lawyer behavior provided by game theory, a lawyer has other psychological reasons to adopt a hard-nosed approach to settlement.

1. *Toughness and Girding for Battle*

At the outset of a case, trial counsel is absorbed with the task of developing a "theory of the case." The process itself is not theoretical, but practical. In essence, the lawyer begins to tell a story, a story which will be told and retold hundreds of times before the jury finally hears it. The story takes into account the undisputed facts and resolves the disputed facts in a

⁵³ See Heumann & Hyman, *supra* note 16, at 265-268.

⁵⁴ See *id.* at 255.

⁵⁵ See *id.* at 257.

⁵⁶ *Id.* at 304 & n.73 (citing Leonard Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 43 (1982)).

⁵⁷ See *id.* at 305-307.

⁵⁸ My experience is somewhat different. I find that lawyers will adopt the language of *Getting to Yes* without applying the principles. For example, I had a lawyer suggest that in determining the value of a piece of property we should split the difference between my client's appraisal and his client's, because that would be the "win-win" solution.

manner both reasonable and favorable to the client. The story has tension; it has a moral. It has heroes and villains—there can be no doubt about who is wearing the white hat. A crucial part of the trial lawyer's task at the outset of a case is therefore to polarize the dispute—to demonize the opponent and to lionize the client.

A trial lawyer's mental preparation at the outset of a case involves not only developing the story, but shaping her own attitude about the case. She is girding for battle—getting ready to fight for the acceptance of her story and the rejection of the opponent's story. She is selling herself on the case, so that she can effectively sell it to judge and jury. This involves a certain amount of deletion and distortion. That is, the lawyer ignores or downplays the importance of facts which do not fit the story and “spins” other facts so that they do fit. The lawyer is also selling the client on the case as the story gets worked out and as the client's role as hero in the script becomes clear.

These steps are good and necessary if the trial lawyer is going to be an effective advocate. However, in most cases, they are precisely contrary to the steps which must be taken in a problem-solving approach to negotiation. To polarize is to eliminate empathy. Problem-solving generally requires the conflict to be depolarized and that recognition be given to the opponent's view of the dispute. Adopting a problem-solving approach to negotiation will likely interfere with the process that a lawyer is going through, and *should* be going through, to prepare for litigation.

On the other hand, the tough approach permits the lawyer, both in litigation and in negotiation, to have a single frame of mind. Without retreating from a litigator's view of the case, a lawyer can easily say: “I am fully prepared to try this case and am confident that my client will win at trial. However, if you want to make an offer to avoid the expense of litigation, I will communicate it to my client.” It is easier still for the litigator to simply make threats and then wait for the other side to realize how weak its position is and surrender.

Attempting to establish dominance by threats is a common approach to conflict resolution. It may be hard-wired into our brains. Think of Konrad Lorenz's description of wolves,⁵⁹ Dian Fossey's accounts of gorillas,⁶⁰ and the name-calling and shoving that precedes schoolyard fights.

For lawyers toughness is attractive, not only because it may lead to an early capitulation by the other side, but because it positions the lawyer

⁵⁹ See KONRAD LORENZ, *KING SOLOMON'S RING: NEW LIGHT ON ANIMAL WAYS* 186–187 (1952) (describing a confrontation between a younger wolf and an older wolf).

⁶⁰ See, e.g., DIAN FOSSEY, *GORILLAS IN THE MIST* 66–70, 144–145 (1983).

favorably with the client. The "tough" lawyer can provide assurance to the client that everything is under control. But this very assurance can lead to yet another barrier to settlement, because it affects the way the client perceives his situation.

2. Risk Aversion and Framing

The bargaining literature notes risk perception as one of the psychological obstacles to settlement.⁶¹ Briefly stated, people tend to value losses more than gains. They feel the "pain" of giving up what they already have more than they feel the pleasure of getting what they do not yet have. As a result, people will refuse a trade-off which is objectively beneficial.

As a corollary, when people are faced with the choice of a certain gain rather than a potentially greater gain which is uncertain, they choose the certain gain. Or, as the psychologists say, they are "risk averse." However, when faced with the choice of a certain loss rather than a potentially smaller loss which is uncertain, they choose the potentially smaller loss. That is, they are "risk preferring."⁶² For example, in one reported experiment, people who were given the hypothetical choice between a certain gain of three thousand dollars, as opposed to an eighty percent chance of winning four thousand dollars and a twenty percent chance of getting nothing, generally chose the sure three thousand dollars. However, people given the choice between a sure loss of three thousand dollars, opposed to an eighty percent chance of losing four thousand dollars and a twenty percent chance of losing nothing, generally chose to take a chance on having to pay nothing.⁶³

The implications for settlement of litigation are profound. Whether people choose the risk of trial over the certainty of settlement may depend on whether they perceive their choice as involving a loss or a gain.⁶⁴ Generally, one would expect that plaintiffs (who stand to gain something) would be more eager to settle, while defendants (who stand to lose something) would be more

⁶¹ See Mnookin, *supra* note 36, at 243-245 (citing Amos Tversky & Richard Thaler, *Anomalies: Preference Reversals*, J. ECON. PERSPECTIVES, Spring 1990, at 201; Amos Tversky et al., *The Causes of Preference Reversals*, AM. ECON. REV., Mar. 1990, at 204).

⁶² See Goodpaster, *supra* note 15, at 346-349; Robert A. Baruch Bush, "What Do We Need a Mediator For?": Mediation's "Value-Added" for Negotiators, 12 OHIO ST. J. ON DISP. RESOL. 1, 11 n.19 (citing MARGARET A. NEALE & MAX H. BAZERMAN, COGNITION AND RATIONALITY IN NEGOTIATION 44-48 (1991)).

⁶³ See Goodpaster, *supra* note 15, at 347.

⁶⁴ See Mnookin, *supra* note 36, at 243-246.

reluctant to settle. Experience generally confirms this. Think of personal injury litigation.

Therefore, it should encourage a party to settle if the situation is framed as one involving a gain rather than a loss. When a party is facing uncertain and expensive litigation, is emotionally distraught, and is concerned about potential liability on claims of the opposing party, anything that will end the immediate "pain" is likely to be seen as a gain. The certain gain of an immediate settlement may appear more attractive than the less certain gain of a resolution by trial in one or two years.

However, once the Champion arrives on the scene, the client's perception may change. A Champion will assure the client that there is no immediate risk and will discuss the route to victory, with the predictable, and intended, effect of diminishing the client's pain. The client then feels comfortable with the status quo, may begin to see the future choice as involving loss rather than gain, and may begin to prefer the risk of trial to the certainty of a settlement.

It is not surprising that hiring a lawyer would have this effect. One of the reasons that lawyers (and courts, for that matter) are valued is that they "level the playing field," so that a weaker client can withstand the pressure of a stronger opponent. The psychological principle is the same. Under this scenario, why do cases eventually settle? Because the client, for whatever reason, be it increasing legal fees, an unpleasant deposition, or discovery of facts which suggest an adverse judgment, once again begins to "feel the pain," so that any method of ending the litigation is seen as a gain. This is, after all, the theory of the Litigator.

The fundamental point, for immediate purposes, is that simply by becoming involved in a case, a lawyer may diminish the likelihood of early settlement. And further, this will occur without the lawyer counseling against settlement. It is likely to occur whenever the lawyer is an effective advocate.

C. Against Settlement

Aside from these psychological reasons which may result in lawyers unconsciously discouraging settlement, lawyers have many good, straightforward reasons for not aggressively promoting early settlement. They include:

- *Litigator image.* Even when the client's goal is settlement, it can be argued that the best plan is to hire an attorney with a "litigator image."⁶⁵ This is the "toughness" argument, reframed slightly.
- *Client expectations.* While some clients are straightforward about wanting to settle quickly, many are not. Faced with a potential client who wants a warrior, a lawyer who follows Lincoln's advice and discourages litigation⁶⁶ may lose not only the prospect of a greater fee, but the client as well. In an ADR counsel roundtable, reported in the September 1996 edition of *Alternatives to the High Costs of Litigation*, an attorney in private practice challenged the idea that law firms put economics ahead of the client's interests by not pursuing ADR. He stated: "I talk ADR to just about every client I meet, and my flunk rate on that is probably about [ninety] percent . . . Sometimes I've got to backpedal quickly or they're going to call up and ask for one of my partners, [and] that's the last time I hear from them."⁶⁷
- *Client optimism.* When a client has an overly optimistic view of the case, efforts to push settlement may also lead to loss of the client. Aggressive "reality testing" may be perceived as an attack on the prospective client's veracity or her business acumen. However, when a lawyer encourages the client, which is frequently the best marketing approach, there is likely to be delay in achieving settlement. Once client expectations are raised, it takes time to lower them. The safest method to achieve this is to let the other side do the reality testing through discovery or pretrial motions. There are substantial pressures, then, for the lawyer to defer settlement

⁶⁵ See PHILIP SPERBER, ATTORNEY'S PRACTICE GUIDE TO NEGOTIATIONS 343-344 (1985).

⁶⁶ Lincoln once said: "Discourage litigation. Persuade neighbors to compromise whenever you can. Point out to them how the nominal winner is often the real loser in fees, expenses, and a waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good [person]." D. Todd Sholar, Note, *Collaborative Law—A Method for the Madness*, 23 MEMPHIS ST. U. L. REV. 667, 667 (1993) (quoting Glen Sato, Comment, *The Mediator-Lawyer: Implications for the Practice of Law and One Argument for Professional Responsibility Guidance—A Proposal for Some Ethical Considerations*, 34 UCLA L. REV. 507, 507 (1986) (quoting F. HILL, LINCOLN THE LAWYER 102 (1906))).

⁶⁷ *Special Supplemental Proceedings*, *supra* note 11, at 98. The typical roundtable phenomenon of lawyers complaining about clients, while clients complain about lawyers, may result from a selection process. Lawyers who attend ADR roundtables are likely to prefer negotiation and mediation as methods for dispute resolution. To the extent they encounter difficulty in their practice, it will be with clients who prefer a more adversarial approach. Clients at ADR roundtables will have a corresponding problem with adversarial lawyers.

and to use litigation as a negotiation tool, both to manipulate the other side into a more favorable position and to control the client.

- *Uncertainty about the law.* There have always been risks involved in “telling would-be clients that they are damned fools and should stop,” to use Elihu Root’s phrase.⁶⁸ Those risks increase greatly in an era of rapid change in the common law. When the law is unsettled, it becomes hard to discern who, exactly, is the damned fool. Is it the client who wants to sue McDonald’s because its coffee is too hot, or is it the lawyer who turns down the case and the seven-figure contingent fee that goes with it?
- *Future shock.* Increasing speed in publishing information about new theories of recovery also makes for uncertainty. There was a time when the most likely way for a lawyer to learn of a new theory was a law review article or an ALR annotation, reviewing published appellate decisions. Now a lawyer hears about the theory within days after the jury verdict, by reading *Lawyer’s Weekly USA*, *American Trial Lawyer*, the *National Law Journal*, similar publications, or through *Lexis Counsel Connect* or some other on-line source.
- *Education.* Historically, law schools have emphasized litigation over negotiation and close analysis of fact and precedent over a search for practical, creative solutions to real problems. To ask lawyers to seek the latter pushes them out of their comfort zone.
- *Popular image.* Lawyers in the media are trial lawyers. We will know that the ADR movement has come of age when the NBC Thursday night lineup includes a show called “The Mediator.”
- *Personality.* Given the popular image, law tends to attract people with competitive dispositions, which tends to make the profession competitive, which feeds the popular image, and so on, in a self-sustaining feedback loop.
- *Enjoyment.* Litigation is challenging, exciting, and, dare I say it, fun. For those who love trial work, life offers few joys greater than a successful verdict after a hard-fought trial.
- *Money.* A firm makes more money by trying a case than by settling it. Lawyers have been pushed, sometimes reluctantly, into viewing law as a business. How many businesses do you know of where the seller has a “duty” to discourage the customer from choosing a higher cost product or service?

⁶⁸ 1 PHILIP JESSUP, ELIHU ROOT 133 (1938).

- *Idealism.* To settle is to give up not only the chance to win, but also the chance to provide clients with what is rightfully theirs under the law. To settle is to accept something less than justice.⁶⁹

IV. THE DUTY TO SETTLE

In the face of all of the reasons why lawyers would be unwise to pursue settlement, especially early settlement, it is frequently stated or implied that lawyers have a "duty" to settle cases.⁷⁰ The ethical rules governing attorney conduct suggest otherwise. What is required of lawyers is "zealous advocacy."⁷¹ That does not sound like a clarion call to seek settlement.

Sometimes a duty to explore settlement is imposed by court rule. For example, varying local rules of the federal district courts frequently require attorneys to undertake a number of settlement directed activities. In their milder form, the rules may require the lawyer to certify that the client has been apprised about the availability and potential cost benefits of ADR.⁷² In their stricter form, the rules may require the lawyer to engage in good faith settlement negotiations as early as possible. The stricter sort of rule exists in the United States District Court for the District of Texas.⁷³ However, in *Dawson v. United States*,⁷⁴ noted in the May 1996 *Alternatives to the High*

⁶⁹ See Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984).

⁷⁰ See, e.g., JAMES W. JEANS, TRIAL ADVOCACY 430 (1975) ("Good practice and proper consideration for the client dictate that the attorney representing an injured party engage in settlement negotiations."); THYGERSON, *supra* note 4, at 51, 53-54 (criticizing lawyers for interceding in disputes in order to move them to the legal arena and asserting that a lawyer paid on an hourly basis has a conflict of interest with the client); Warren E. Burger, "Isn't There a Better Way?," 68 A.B.A. J. 274, 274 (1982) (noting that "[t]he obligation of our profession is, or has long been thought to be, to serve as healers of human conflicts"; also quoting the now-ubiquitous Lincoln directive to "discourage litigation," discussed *supra* note 66); Goodpaster, *supra* note 9, at 235-236 (noting that court mandated ADR schemes that leave the lawyer as the "primary switchman" for dispute resolution attempt to separate a lawyer's duty from his self-interest). More generally, the criticism that lawyers "foment controversy," Issacharoff et al., *supra* note 4, at 51, is at root an assertion that lawyers have an obligation to quiet controversy.

⁷¹ See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101 (1980); MODEL RULES OF PROFESSIONAL CONDUCT Preamble (1998).

⁷² See, e.g., D. MASS. R. 16.1.

⁷³ See U.S. DIST. COURT FOR THE N. DIST. OF TEX., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN § IV (1993).

⁷⁴ 68 F.3d 886 (5th Cir. 1995).

Costs of Litigation,⁷⁵ the Fifth Circuit reversed sanctions imposed on attorneys who had refused to make a cash settlement offer to an inmate injured in a prison softball game.⁷⁶ The court felt that the defendant's desire to discourage similar lawsuits and the expectation that the plaintiff might simply drop the suit justified the refusal to make a more substantial offer.⁷⁷ While regarding early settlement as a laudable goal, the court ruled that "good faith" requires only an open mind, not a specific result.⁷⁸

Case law has generally held that courts cannot require parties to settle,⁷⁹ and some court rules expressly provide that parties cannot be pressured to settle in court-sponsored programs.⁸⁰ This is not to say that lawyers have no responsibility for settlement. A lawyer who dissuades a client from accepting a good settlement offer and instead urges fruitless and ill advised litigation may be liable in malpractice.⁸¹ On the other hand, a lawyer may be liable for advising settlement when the offer is too low.⁸²

In short, notwithstanding Lincoln's often-quoted advice to discourage litigation, lawyers have no overarching duty to settle cases. Ultimately, the decision to settle, or not, rests with the client.⁸³ At the outset of a dispute, the merits of settlement versus litigation are generally not clear. A lawyer can, in good faith, advise either course. Court rules cannot change this. Court-ordered settlement, like court-ordered mediation, is an oxymoron.

With personality, training, financial incentives, and various risk factors all weighing in against early settlement, it may be too much to ask lawyers,

⁷⁵ See *What Is a "Good-Faith" Settlement Effort?*, 14 ALTERNATIVES TO HIGH COSTS LITIG. 59, 59 (1996).

⁷⁶ See *Dawson*, 68 F.3d at 898.

⁷⁷ See *id.* at 898.

⁷⁸ See *id.* at 897-898.

⁷⁹ See *Kothe v. Smith*, 771 F.2d 667, 669 (2d Cir. 1985); *Semiconductors, Inc. v. Goksa*, 525 So. 2d 519, 519 (Fla. Dist. Ct. App. 1988); see also *Winston*, *supra* note 8, at 203-204.

⁸⁰ For example, Rule 6(i) of the Massachusetts Uniform Rules on Dispute Resolution provides: "Inappropriate Pressure to Settle. Courts shall inform parties that, unless otherwise required by law, they are not required to make offers and concessions or to settle in a court-connected dispute resolution process. Courts shall not impose sanctions for nonsettlement by the parties." *News from the Courts*, MASS. LAW. WKLY., May 11, 1998, at 26.

⁸¹ See *Spilios v. Cohen*, 647 N.E.2d 1218, 1220 (Mass. App. Ct. 1995).

⁸² See *Fishman v. Brooks*, 487 N.E.2d 1377, 1380 (Mass. 1986).

⁸³ See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8 (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1998).

operating under our current model of dispute resolution, to follow Lincoln's advice. The solution is to change the model.

V. SETTLEMENT COUNSEL—THEORY

The basic idea of the settlement counsel model is to have an attorney, other than trial counsel, attempt to resolve the dispute by negotiation, before litigation commences in earnest. One fundamental purpose of using settlement counsel is to change the model of dispute resolution so that a lawyer's "duty to settle" is aligned with self-interest, both financial and psychological. The lawyer has a duty to explore settlement, not because Warren Burger said so,⁸⁴ or because of a court rule, but because the client has directed it. The attorney is paid to explore settlement, knowing that another attorney will handle the case if efforts to reach a negotiated solution are unsuccessful. The pressure to be a Champion, or a Hired Gun, or a Litigator is reduced so that problem-solving can take place.

Another purpose is to encourage the client to carefully weigh all alternatives before choosing litigation. I do not suggest that settlement counsel should press for settlement despite a strong litigation alternative. The attorney's obligation is to help the client reach an optimal result, not to reduce court caseloads. However, settlement counsel is encouraged to look at the overall situation, not just the legal aspects, to determine what factors make a solution optimal.

One other fundamental purpose of the settlement counsel model is to provide room for a "value creating" phase of the negotiations, before the "value claiming" begins in earnest.⁸⁵ There is no guarantee that the parties will utilize interest-based bargaining at this time, but the incentives to do so are greater because settlement counsel, operating on a short time frame, wants to avoid an impasse and arrive at a range of "Pareto optimal" solutions as soon as possible.⁸⁶

⁸⁴ See generally Burger, *supra* note 70.

⁸⁵ "Value creating" may be defined as the process of devising "increased sum" solutions to the parties' common problems; "value claiming" is the process of dividing up the gains that the parties have created. LAX & SEBENIUS, *supra* note 52, at 30, 32.

⁸⁶ A "Pareto optimal" solution is one of the potential solutions to a negotiating problem which maximizes the potential joint gains for each party. That is, neither party will give anything more to the other party without getting more for itself. As it is sometimes put, in a Pareto optimal solution, the parties "leave nothing on the table." The range of Pareto optimal solutions to a particular negotiation is sometimes referred to as the "efficient frontier." HOWARD RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* 139, 158-164 (1982);

Principled bargaining sounds wonderful in theory, but it is extraordinarily difficult to apply in a dispute that, on its face, seems to be about money, especially in the charged atmosphere that precedes most litigation. The problem is not so much that lawyers do not know about nonadjudicatory methods of solving disputes—anyone with a spouse or a child has had to learn other techniques. Rather, the problem, as noted earlier, is that the mind-set needed to do effective problem-solving is incompatible with the mind-set needed to pursue litigation whole-heartedly. Put simply, it is difficult to do creative problem-solving while beating on your chest and throwing clumps of grass in the air. By using settlement counsel, a client may be able to create a calm before the storm, a calm in which problem-solving can occur. Perhaps most importantly, settlement counsel should have an advantage over trial counsel in overcoming commonly identified obstacles to settlement.

A. *Why Cases Do Not Settle*

There is substantial literature on the question of why cases do not settle, or do not settle sooner.⁸⁷ Some of those reasons have already been touched on in discussing why lawyers lack incentives to produce early settlement.⁸⁸ Other reasons advanced suggest that efforts at early settlement are misdirected. Others involve psychological barriers to communication in negotiations.⁸⁹ A complete discussion of those obstacles, and how settlement counsel could better address them, is beyond the scope of this Article. However, a review of some of the most commonly cited obstacles shows how settlement counsel has a distinct advantage.

1. *The Case Should Not Settle*

It is frequently asserted that some cases are inappropriate for settlement for strategic reasons. There may be a need to establish a precedent.⁹⁰ The

Goodpaster, *supra* note 15, at 327.

⁸⁷ See generally DWIGHT GOLANN, *MEDIATING LEGAL DISPUTES: EFFECTIVE STRATEGIES FOR LAWYERS AND MEDIATORS* (1996); THYGERSON, *supra* note 4; Issacharoff et al., *supra* note 4; Mnookin, *supra* note 36; Ross & Stilling, *supra* note 36; see also SPERBER, *supra* note 65, at 340–347; Goodpaster, *supra* note 9, at 222.

⁸⁸ See *supra* Part III.

⁸⁹ See generally sources cited *supra* note 87.

⁹⁰ See GOLANN, *supra* note 87, § 8.3, at 235; SPERBER, *supra* note 65, at 340; Goodpaster, *supra* note 9, at 222.

client may want to "send a message" to third parties—e.g., other potential claimants.⁹¹ The client may feel the need for retribution to remedy a perceived injustice.⁹² (Indeed, litigation itself may be seen as a form of retribution, either by imposing costs of litigation or by impairing a competitor's ability to compete.) A company may want to protect its reputation.⁹³ The bargaining strength of the parties may be so unequal that one side feels the need to resort to the courts to level the playing field.⁹⁴

Whatever the validity of these reasons, the fact remains that ninety percent of all cases settle.⁹⁵ Cases in which the above factors are present may fall within the remaining ten percent. It is likely, however, that many cases that "should not settle" do settle in the end. At some point before trial, the client decides that the need for retribution or for a precedent does not outweigh the benefits of settlement. Or, the party realizes that reputation is better protected by a confidential settlement. The natural question: Why did the party not come to this realization sooner? The task of settlement counsel is precisely to help the client engage in a thoughtful weighing of alternate strategies *before* beginning litigation.

2. A Better BATNA

It is sometimes urged that clients should not settle if they believe that the net result after trial, including the costs incurred by going to trial, is better than the other side's settlement offer. In the patois of *Getting to Yes*, one would say that the client has a better BATNA (Best Alternative to a Negotiated Agreement).⁹⁶

As with the first obstacle, this does not explain how it is that so many cases eventually settle. One would expect that if the trial alternative were better at the outset, before significant litigation costs were incurred, it would remain so throughout the litigation.⁹⁷ Has the BATNA really changed, or is the problem rather that the initial assessment was only half-hearted?

⁹¹ See SPERBER, *supra* note 65, at 340.

⁹² See *id.*

⁹³ See GOLANN, *supra* note 87, § 8.3, at 235; cf. Issacharoff et al., *supra* note 4, at 70–71 (noting that in medical malpractice cases physicians may regard reputation as an impediment to settlement).

⁹⁴ See Goodpaster, *supra* note 9, at 229.

⁹⁵ See Davis, *supra* note 3, at 229 & n.2.

⁹⁶ See FISHER ET AL., *supra* note 15, at 97–106.

⁹⁷ This raises the issue of psychological errors in predicting the outcome of legal disputes and the impact of those errors on settlement discussions. See GOLANN, *supra* note

All too often parties do not fully explore the possibilities of early settlement or the costs (financial and emotional) of the alternative. It is surprising how often people who would not spend twenty thousand dollars on a new car without carefully considering options will spend several times that much on litigation without undertaking a serious cost-benefit analysis of the alternatives. Once again, settlement counsel is retained precisely to undertake such an analysis.

3. Time to "Cool Off"

Another reason, proffered more often by practitioners than by professors, is that the parties need time to let emotions settle down before serious settlement discussions can take place. If there is genuine interest in early settlement, this approach is simply wrong-headed. It ignores the critical role of the initial stages of negotiation in setting reference points and in establishing the tone for the entire negotiation.

The appeal of a cooling off period is clear. For those favoring a positional bargaining style, setting of the "target point" (goal) and "resistance point" or "reservation price" (bottom line) is the first order of business.⁹⁸ Those reference points control the pattern of concessions which will eventually permit compromise, or not. To permit those points to be set while emotions are running high jeopardizes the eventual success of negotiations. In addition,

87, § 8.2, at 223-234; Amy Farmer & Paul Pecorino, *Issues of Informational Asymmetry in Legal Bargaining*, in *DISPUTE RESOLUTION: BRIDGING THE GAP*, *supra* note 4, at 79, 79-80; Issacharoff et al., *supra* note 4, at 52; Ross & Stillinger, *supra* note 36, at 390. A full discussion of the issue is beyond the scope of this Article, not to mention the expertise of the Author. This much can be said: While settlement counsel has no crystal ball to foresee the outcome of litigation, he is less susceptible to some of the prediction errors that have been identified.

Farmer and Pecorino discuss the problem of information asymmetry—i.e., ignorance about the other side's case—and how case information is communicated indirectly through settlement offers and demands in contentious positional bargaining. *See* Farmer & Pecorino, *supra*, at 80, 90. Settlement counsel is unlikely to use that bargaining style and will take a direct approach to finding out information about the other side's case. Settlement counsel is also less likely to withhold information in order to amplify litigation threats.

Settlement counsel is not free from bias in assessing client information and communications from the other side. However, to the extent that settlement counsel can reduce enmity and induce cooperation, bias may be lessened. *See* Ross & Stillinger, *supra* note 36, at 397. In addition, settlement counsel will be aware of the problem of bias and of techniques such as framing and use of a mediator to counter its effects.

⁹⁸ *See* RAIFFA, *supra* note 86, at 45; Menkel-Meadow, *supra* note 15, at 770.

the sort of highly competitive behavior likely to result from high emotions will beget similar behavior from the other side, resulting in an impasse.⁹⁹ Lawyers may be inclined to delay negotiations so that the parties can negotiate more cooperatively with lower initial reference points.

In reality, this argument is not so much an argument for a cooling off period as it is an argument against positional negotiation. The positional negotiator frequently lacks tools to defuse emotions, other than making concessions. This approach may prove unwise if the other side treats those concessions as a sign of weakness. The "principled" negotiator acknowledges that emotions are an issue. The first two tasks in what Ury calls the "breakthrough strategy" are to gain control of your side's emotions by "stepping to the balcony" and to deflect the other side's emotions by "stepping to their side."¹⁰⁰

For many reasons, the cooling off strategy is likely to fail. The accusations and probing discovery typical in hotly contested litigation are likely to elevate, not lower, the temperature of the dispute. Even if no settlement communications occur at the outset, parties ask their lawyers about the value of the case, and "anchoring" will occur, without the benefit of dialogue with the other side.¹⁰¹

As expenses begin to be incurred, parties often feel that they have to get their legal fees back in order to avoid losing ground, making settlement even less likely. Business disputes and other cases in which hourly fees are charged are not zero-sum games at the outset, precisely because there is a mutual opportunity for saving legal fees. As that opportunity diminishes, the parties may find themselves in a situation where litigation seems the least unpalatable alternative—i.e., the only way to get back what has already been spent.

Time is critical for another reason. To allow a cooling off period is to disregard the positive influence that deadlines can have on dispute resolution. Deadlines can assist parties in getting through some of the psychological barriers to settlement.¹⁰² Professor Dwight Golann suggests a six-step strategy for settlement which begins with creating a "settlement event" to overcome procrastination and other causes of delay in settlement.¹⁰³ The threat of filing a complaint can create such an event.

⁹⁹ See Menkel-Meadow, *supra* note 15, at 780-782.

¹⁰⁰ WILLIAM URY, GETTING PAST NO: NEGOTIATING YOUR WAY FROM CONFRONTATION TO COOPERATION 11, 16-33, 35-37 (1993).

¹⁰¹ See Goodpaster, *supra* note 15, at 349-350.

¹⁰² See Ross & Stillinger, *supra* note 36, at 398-400.

¹⁰³ See GOLANN, *supra* note 87, § 2.1.1, at 41.

Courts also use settlement events to promote settlement. The Early Intervention Program in Massachusetts¹⁰⁴ as well as Early Neutral Evaluation (ENE) programs in several U.S. district courts¹⁰⁵ have produced settlement in thirty-seven to sixty-six percent of cases within the first four to six months

¹⁰⁴ The Massachusetts Early Intervention Program was the result of a task force of judges and lawyers assembled to advise the Supreme Judicial Court's Standing Committee on Dispute Resolution. The group's final report, dated October 12, 1995, urged a statewide plan for early court intervention in which a judge, or a clerk-magistrate if no judge were available, would meet with attorneys in a case, not more than six months after the answer is filed, to discuss settlement as well as case scheduling and management conflicts. *See* SUPREME JUDICIAL COURT/TRIAL COURT STANDING COMM. ON DISPUTE RESOLUTION, DISPUTE RESOLUTION IN THE COURTS app.D, 63-67 (1996).

In a telephone conversation with Wrentham District Court Judge Daniel Winslow, the Author learned that a pilot phase of the program was implemented in the Wrentham Court as well as in several other courts. Judge Winslow reported that in his court, approximately 50% of civil cases settled before or at the early intervention conference and that half of the remaining cases settled before the pretrial conference. He further stated that in January 1998, the program was expanded to all district courts in Norfolk and Middlesex counties. Comparison of case disposition rates in those two counties for the first five months of 1998 with rates for the comparable period for the previous year showed that management conferences were having a measureable impact. In some courts, the disposition rate quadrupled over the previous year. *See* Telephone Interviews with Judge Daniel Winslow, Wrentham, Massachusetts District Court (May 15, 1998, July 22, 1998).

¹⁰⁵ In the Early Neutral Evaluation program used in the U.S. District Court for the Northern District of California, an experienced trial attorney is appointed to give the parties a neutral evaluation of their case within three to four months after the case is filed. *See* WAYNE D. BRAZIL, EFFECTIVE APPROACHES TO SETTLEMENT: A HANDBOOK FOR LAWYERS AND JUDGES 26-30 (1988); Robert Peckham, *Supplement: Early Neutral Evaluating*, in ALTERNATIVE DISPUTE RESOLUTION: A HANDBOOK FOR JUDGES 101 (Lawrence Freedman et al. eds., 1987). Even though ENE is not designed primarily to encourage settlement, 37% of the cases in which ENE was held settled during the evaluation or as a result of it. *See* Wayne D. Brazil, *A Close Look at Three Court-Sponsored ADR Programs: Why They Exist, How They Operate, What They Deliver, and Whether They Threaten Important Values*, University of Chicago Legal Forum 46 (1990), summarized in SUPREME JUDICIAL COURT/TRIAL COURT STANDING COMM. ON DISPUTE RESOLUTION FOR THE CHIEF JUSTICE FOR ADMIN. & MANAGEMENT OF THE TRIAL COURT, REPORT TO THE LEGISLATURE ON THE IMPACT OF ALTERNATIVE DISPUTE RESOLUTION ON THE MASSACHUSETTS TRIAL COURT 68, 68 (1998). In a similar program in the U.S. District Court for the District of Vermont, almost 40% of the ENE eligible cases settled *before* the ENE session and 26% of the cases participating in ENE reached full settlement at the session. Sessions were generally to be held about halfway through the eight-month discovery period. *See* John Fitzhugh, *Report Card on ENE: Early Neutral Evaluation in the Vermont Federal District Court*, ADR CURRENTS, June 1998, at 11, 11-14.

after a case is filed. While the timing of federal ENE programs and the Massachusetts Early Intervention Program would permit several months for the parties to cool off, the results in each of these programs belies the conventional wisdom that cases are not ripe for settlement until the time of the pretrial conference, after all discovery is completed. They also show the value of a settlement event in promoting early settlement.

For the Litigator, the filing of a complaint is the signal to begin the process of wearing the other side down. For the Champion, filing the complaint is the first step in waging battle for the client. Both will want to file suit immediately. For settlement counsel, the filing of the complaint is an important deadline that should not be permitted to pass without squeezing out the last drop of dispute resolution potential. The next significant court-imposed deadline may not occur until the pretrial conference a year or more in the future.

While it requires skill, tact, and persistence to achieve settlement in the face of strong emotions and the rush to battle, there is a significant chance that an important settlement opportunity will be missed if negotiations are put on the shelf for a few weeks or months to allow time for cooling off. Settlement counsel operates on a shortened time frame and usually cannot afford a cooling off period. His or her task is to get beyond the heightened emotions, to seek a sensible and mutually satisfactory solution to the problem at hand, and to do so immediately.

4. *Critical Facts in Dispute*

One reason frequently given for failures of settlement is the existence of factual disputes on important issues.¹⁰⁶ The implication is that a case can be settled only after all important factual disputes have been resolved. Any lawyer in a litigation practice knows that this is nonsense. Cases settle every day, some of them on the courthouse steps, without a resolution of factual disputes. Indeed, it has been noted that the uncertainty that results from unresolved facts can itself provide an *incentive* to settle.¹⁰⁷ Mediators, especially those of the facilitative flavor, tend to be less enamored of facts than most lawyers.¹⁰⁸

¹⁰⁶ See GOLANN, *supra* note 87, § 8.1, at 218; Goodpaster, *supra* note 9, at 226, 228.

¹⁰⁷ See Goodpaster, *supra* note 9, at 226.

¹⁰⁸ See generally Albie M. Davis, *Follett on Facts: Timely Advice from an ADR Pioneer*, 7 NEGOTIATION J. 131 (1991).

Settlement counsel takes a different view of the facts for another reason. The facts which must be resolved to render a verdict in a case are not necessarily the ones which are important for settlement purposes. For example, in a case involving enforcement of a covenant not to compete, there may be a hotly contested factual dispute about whether the former employee took away a customer list. However, if the employer's primary interest is to protect certain key accounts, it may be possible to settle the case without resolving the customer list issue.

In general, where the problem-solving model of negotiation is used, the most important "facts" have to do with a party's goals and interests. The focus of discussion tends to be the future, rather than the past. From this vantage point, it can be less important to determine whether one person did, or did not, breach some legal duty to the other. Settlement counsel, using a problem-solving approach, is therefore less likely than trial counsel to get bogged down in the "he said, she said" of prelitigatory posturing. Where there genuinely are facts critical to achieving settlement in dispute, settlement counsel has a panoply of ADR devices, short of a full trial, to resolve them. Mediation, neutral evaluation, mini-trial, and binding or nonbinding arbitration of key issues are all available if negotiation fails.

5. It Is a Matter of Principle

While appeals to principle can often be written off as a tactic of those angling for a better settlement, this is not always a safe assumption. Sometimes a cigar is just a cigar. Cases in which important principles are truly at stake tend to be the most intractable, for settlement counsel as well as for trial counsel. The difference is that trial counsel will be sorely tempted to break off the frustrating negotiations and use the litigation to punish the other side for their intransigence. Settlement counsel does not have this option. For settlement counsel, to give up is to surrender.

Settlement counsel is also less likely to be trapped by appeals to principle. A "principled" negotiator knows that there are many principles and that few disputes involve only one of them. Through his experiences implementing mediation programs as a former Chief of the Government Bureau for the Attorney General of Massachusetts, Suffolk University Law Professor Dwight Golann developed a number of approaches to mediating cases in which principles figure prominently.¹⁰⁹ Some of the techniques, such as reducing

¹⁰⁹ See Dwight Golann, *If You're Willing to Experiment, 'Principle' Cases Can Be Mediated*, 16 ALTERNATIVES TO HIGH COSTS LITIG. 37, 50 (1998).

external pressure, reframing the situation to de-emphasize the principle, pointing out the danger that a particular moral principle may not be accepted by the court, and introducing third parties with moral authority,¹¹⁰ can be applied by settlement counsel directly. Others can be effected by a mediator, if that step is necessary.

This is not to suggest that settlement of cases involving principle, or any of the above obstacles, will be easy. But for all the reasons described above, settlement counsel should, in theory, produce better results than trial counsel in early resolution of legal disputes. To my knowledge, there has been no systematic study to confirm this, but there are scattered reports indicating that the settlement counsel model is being used successfully throughout the country.¹¹¹

VI. SETTLEMENT COUNSEL—PRACTICE

A. *News from the Front*

A model with substantial similarities to the settlement counsel model, known as collaborative law, was begun in the early 1990s by a group of lawyers in Minneapolis. The model was discussed in a 1993 law review article.¹¹² It has spread to other areas of the country, especially among practitioners in divorce and family law.¹¹³ More recently, a member of a San Francisco collaborative outlined the basic principles:

Described simply, the collaborative law process consists of two parties and their respective attorneys, who sign a binding stipulation defining the scope and sole purpose of representation: to help the parties engage in creative problem-solving toward a negotiated agreement designed to meet the legitimate needs of both of them. In the collaborative law process, the parties agree that no one will threaten litigation to coerce compromises, and if either party does resort to the courts for dispute resolution, both lawyers are automatically disqualified from further representation of either of them against the other.¹¹⁴

¹¹⁰ See *id.* at 50–51.

¹¹¹ See discussion *infra* Part VI.A.

¹¹² See Sholar, *supra* note 66, at 669–673.

¹¹³ See *id.* at 667–668.

¹¹⁴ Pauline H. Tesler, *Collaborative Law: A New Approach to Family Law ADR*, CONFLICT MGMT., Summer 1996, at 12, 13.

Practice of collaborative law has been found to reduce both contentiousness and cost. One practitioner has estimated the cost of a divorce using the collaborative approach to be one-third the cost of a typical litigated divorce.¹¹⁵

James McGuire heads the ADR practice group at the Boston firm of Brown, Rudnick, Freed & Gesmer. He began his practice in litigation, but as he realized over time that he was developing a distinctive set of skills in settling law suits, he moved into ADR.¹¹⁶ He has acted as settlement counsel, using the two-track approach both with lawyers in his own firm and lawyers from other firms, and also using the model suggested here—attempting to resolve cases before litigation commences. He has devised a number of ways in which settlement counsel can charge a premium for their services, based upon the benefit conferred in settling the case quickly. The March 1998 issue of *Alternatives to the High Costs of Litigation* reported McGuire's participation in an ADR roundtable sponsored by the CPR Institute for Dispute Resolution, in which he suggested that the best role for lawyers in alternative dispute resolution is neither as neutrals nor in process design but in acting as settlement counsel.¹¹⁷

When the Southern California firm of Irell & Manella wanted to create an ADR department, they lured John Wagner from his position as a federal magistrate judge in the Northern District of Oklahoma.¹¹⁸ On the bench, Wagner had a strong interest in promoting settlements. He established and administered a court-annexed mediation program which provided an opportunity to experiment with the timing of settlement efforts. Initially, he found that lawyers were "outside their comfort zone" if asked about settling before discovery was completed and observed that lawyers were often so busy litigating that they missed golden opportunities to settle cases. Both on the bench and in private practice, Wagner observed the advantages which settlement counsel brings to resolution of difficult disputes. As a magistrate judge, he had presided over the settlement of a matter which had involved numerous hearings, a trial, and multiple appeals over twenty-three years of

¹¹⁵ See Sholar, *supra* note 66, at 672.

¹¹⁶ See Telephone Interview with James McGuire, Head of ADR Practice Group, Brown, Rudnick, Freed & Gesmer (May 26, 1998).

¹¹⁷ See *Winter Meeting Supplement*, 16 ALTERNATIVES TO HIGH COSTS LITIG. 45, 48 (1998).

¹¹⁸ See *ADR Briefs: Private Lawfirm Will Open ADR Center*, 16 ALTERNATIVES TO HIGH COSTS LITIG. 42, 42 (1998); Telephone Interviews with John Wagner, Member of ADR Department at Irell & Manella (Mar. 25, 1998, June 24, 1998).

bitter litigation. This case was finally settled when one side retained settlement counsel. This perspective shaped Wagner's approach to acting as settlement counsel. He has found that he can initiate settlement talks without showing weakness. He can say: "Our firm characteristically takes a two-track approach in cases like this, exploring settlement while litigation goes on. My job is to settle the case."¹¹⁹ Wagner's role as settlement counsel enabled him to structure a successful stand-still agreement as an alternative to a preliminary injunction in a hotly contested case in which the survival of a business was at stake. He is certain that trial counsel alone could not have gotten the same result because the litigation was so contentious.

In the January 1998 issue of the *American Bar Association Journal*, Natasha Lisman of Sugarman, Rogers, Barshak & Cohen in Boston reported using an approach to early settlement that is sensible, if unusual.¹²⁰ She suggested to opposing counsel that the parties hold a one-day mediated negotiation, after a voluntary exchange of all discoverable documents. In the two cases in which she tried the approach, it was successful.¹²¹ Her account articulates the following factors which can make this approach difficult for lawyers: (1) the leap of faith required to open files to opposing counsel; (2) the loss of a larger fee; and (3) the risk that the client may feel that the lawyer who wants to talk settlement right away is not zealous.¹²² While noting that there are cases in which this approach might not work—e.g., where depositions are necessary—she believes that there are many cases in which it could successfully be used.¹²³

David Hoffman of the Boston firm of Hill & Barlow reports success in achieving early settlement even in cases where depositions are required. The technique he has used is a time-limited deposition, generally two to four hours long, geared towards getting information needed for settlement. He has used the technique both during litigation and before a complaint is filed. Hoffman believes that because people will not mediate a case twice, information necessary to permit case assessment should be obtained before the mediation session. The additional expense will be justified by the increased likelihood of reaching a settlement.¹²⁴

¹¹⁹ Telephone Interview with John Wagner, *supra* note 118.

¹²⁰ See Steven Keeva, *Inventing Solutions*, A.B.A. J., Jan. 1998, at 58, 61–62.

¹²¹ See *id.*

¹²² See *id.* at 62.

¹²³ See *id.*

¹²⁴ See Telephone Interview with David Hoffman, Hill & Barlow (July 10, 1998).

This anecdotal evidence shows that lawyers cannot uniformly be described as discouraging early resolution of cases. To the contrary, many lawyers are searching for ways to overcome obstacles to settlement and are using the settlement counsel approach to do so. From my own experience, as well as the reports of others, it is possible to delineate the basic settlement counsel technique.

B. *Technique*

The task of settlement counsel will typically begin when the lawyer is retained for the express purpose of exploring the possibility of a reasonable settlement before litigation begins or during the pleading stage. Counsel meets with the client, and perhaps some friendly witnesses, to gain a sufficient understanding of the dispute, makes a preliminary determination that the other side has some interest in immediate negotiations, and probes to determine the client's underlying interests and the client's perception of the other side's interests. Counsel then focuses on the client's specific goals and budget.

With this information, counsel and client are ready to do an initial analysis of the alternatives. This may take the form of a risk analysis using a detailed decision tree,¹²⁵ or it may be less formal. The key is that the client understand the expected costs and benefits of litigation and have a clear goal for the negotiations. If settlement counsel has litigation experience, he can estimate the costs of litigation. Otherwise, another attorney must be utilized. The final step is to develop an initial strategy for the negotiations. A time frame should be established. Otherwise, there is a risk that counsel's optimism and self-confidence, not to mention financial self-interest, may unduly prolong futile discussions.

Once the preliminary work is done, counsel can begin discussions with the other side, framing the negotiation in problem-solving terms. Counsel probes to discover the other side's real interests and to uncover potential win-win approaches. Jockeying for position is avoided at this stage. The goal is to create an atmosphere which maximizes the incentives for value creation, or at least minimizes the risks. Only after there has been a thorough opportunity to explore mutually satisfactory resolutions should the next phase of the negotiations begin.

If a mutually beneficial approach has been discovered, the dispute can

¹²⁵ See, e.g., Marjorie Corman Aaron & David P. Hoffer, *Using Decision Trees as Tools for Settlement*, 14 ALTERNATIVES TO HIGH COSTS LITIG. 71 (1996); James E. McGuire, *Risk Analysis in Mediation*, DISP. RESOL. J., May 1998, at 15.

move to resolution using integrative methods. If, as is more likely in most legal negotiations, there is no clear win-win solution, counsel must decide how to proceed. The interest-based model of *Getting to Yes*¹²⁶ can still control, or counsel can shift to a more traditional, competitive method for the value claiming stage. This depends on the individual negotiator's style and experience. If information needs to be exchanged to permit negotiations to continue, that can be done by voluntary exchange of information or, if litigation has commenced, by limiting initial discovery to facts needed to resolve the dispute. This sort of phasing of discovery is encouraged by Federal Rule of Civil Procedure 26(f)(2).¹²⁷

If negotiations stall, counsel may want to suggest an appropriate form of ADR to keep the ball rolling. There is no need to wait for court intervention to create a "multi-door courthouse"; all of the tools are there, waiting to be used. The question of which method of ADR to try can only be answered on a case-by-case basis, but, in general, less intrusive and less expensive alternatives, like mediation, will be preferred over mini-trials and arbitration. As more adjudicative forms of ADR are considered, counsel must help the client weigh the costs and benefits of bringing in trial counsel immediately.

There is nothing revolutionary in the technique of settlement counsel described above. It simply involves using standard, time-tested techniques of client counseling and interest-based methods of negotiation. What is different is that by changing the model to have separate counsel attempt negotiations before the litigation commences, the lawyer is freed to use problem-solving methods to the fullest.

C. The Value of an Explicit Model

One potential obstacle to using problem-solving methods to the fullest extent looms large—the other side. Inducing the other side to adopt a problem-solving style may be settlement counsel's foremost challenge. There is always the risk that the other side will, in bad faith, encourage settlement counsel to make concessions or to disclose valuable information without reciprocating. Does this mean that settlement counsel is at a disadvantage when dealing with trial counsel on the other side? If so, does this disadvantage mean that the client may be unwise in retaining settlement counsel to begin with?

¹²⁶ See FISHER ET AL., *supra* note 15, at 40–55.

¹²⁷ See FED. R. CIV. P. 26(f)(2) ("The [proposed discovery] plan shall indicate the parties' views and proposals concerning . . . (2) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues.").

Ronald Gilson and Robert Mnookin explored a similar problem—how lawyers can cooperate in the exchange of information in litigation.¹²⁸ They suggest that parties deciding whether to litigate cooperatively face a Prisoner's Dilemma.¹²⁹ If one party is forthcoming in providing damaging information, while the other side stonewalls, the first party will be at a disadvantage in the litigation. This dilemma can be avoided if each side signals its willingness to litigate cooperatively. Parties can send such a signal by hiring a cooperative lawyer.¹³⁰

The problem then becomes finding a cooperative lawyer. Gilson and Mnookin focus on the "reputation market" as a means of carrying out the search.¹³¹ They suggest two strategies for developing a reputation for cooperativeness—creation of a boutique firm specializing in cooperative litigation and creation of a specialized department for cooperative litigation

¹²⁸ See Gilson & Mnookin, *supra* note 52, at 509.

¹²⁹ See *id.* at 514.

¹³⁰ See *id.* at 522.

¹³¹ *Id.* at 525–527. Gilson and Mnookin posit two types of lawyers—cooperative lawyers and gladiators. They reason that cooperative lawyers will be more highly valued because they produce more efficient results. Clients should therefore be willing to pay a premium for their services. In theory, the reputation market both enables the client to find cooperative lawyers and ensures the lawyers continued cooperativeness. That is, a lawyer who "defects" and acts uncooperatively in a particular case risks losing the reputation for cooperativeness and the ability to charge the premium which goes with that reputation. See *id.* at 526.

A parallel argument can be made for settlement counsel. Because settlement counsel produce more efficient results, the client should be willing to pay a premium for their services. In this way, skilled lawyers have a financial incentive to move from litigation to dispute resolution as an area of practice and have an incentive to problem-solve in the immediate case. The question of whether, and under what circumstances, ADR counsel can charge a premium for services, and the related issue of the viability of law firm ADR, is hotly debated. See *Winter Meeting Supplement*, *supra* note 117, at 47. It will be years before the issue is resolved, and it will ultimately be settled not at a roundtable, but in the marketplace.

Gilson and Mnookin make an intriguing argument. However, the premise that clients value cooperative lawyers more highly than gladiators is contrary to conventional wisdom. It would be useful to confirm the premise by a comparison of hourly rates, or otherwise. The authors also posit a system driven solely by rational, economic behavior. I have discovered that, in practice, this is often not the case. For both litigators and settlement counsel, cooperation is difficult if the client seeks retribution or is otherwise emotionally distraught. There is the further question of the lawyer's ability to control a combat-minded client, particularly in the current buyer's market. Whatever economic incentives a lawyer may have to act cooperatively, the ultimate decision to settle, or not, rests with the client.

within a large firm.¹³² The parallels to Fisher's suggestions of a boutique ADR firm and a specialized ADR department are clear.¹³³ What is less clear is that a reputation market can function effectively. Gilson and Mnookin conclude that there is a functioning reputation market in some areas of the law (e.g., divorce litigation) but not in others (e.g., business litigation).¹³⁴

When reputation does not provide a touchstone to identify opposing counsel as cooperative or as a gladiator (or for that matter, a Champion, Hired Gun, Litigator, or Healer), an explicit model of the process may help. Counsel is proven trustworthy not by reputation from previous cases, but by observable behavior in complying with an agreed process for resolution. The key question is whether counsel will, *in this case*, suspend litigation, take a problem-solving approach to negotiations, make the client available for a settlement meeting, disclose key documents, enter into mediation, and so on. Of course, information about past performance is useful, but should not dictate the approach taken by settlement counsel. The ultimate issue is trust, not reputation. By being aware of the risks of unreciprocated cooperation and by using an explicit model to monitor the other side's cooperation, a lawyer can minimize any disadvantage that settlement counsel obtains from initiating cooperation.

A clear picture of the steps involved in settling the case will not only help determine whether opposing counsel is "playing ball," but will also help explain what it means to "play ball." In my experience, the idea of suspending litigation to do problem-solving is foreign to many attorneys. Simply saying, "I would like to see if the case can be settled," may not communicate any more than, "I am comfortable with my case but will let you persuade me not to go forward." It is often necessary to lay out some win-win possibilities and to describe the problem-solving method in more detail.¹³⁵

There is another potential benefit in being explicit about the approach. It invites the other side to help shape the dispute resolution process. If opposing counsel is not well known, the process of building mutual trust can start. In transformative terms, the dance of empowerment and recognition can begin before sensitive substantive issues are at stake. Defining the dispute resolution process helps the parties to own the dispute. Time spent negotiating about the

¹³² See Gilson & Mnookin, *supra* note 52, at 557-561.

¹³³ See Fisher, *What About Negotiation*, *supra* note 1, at 1222-1224.

¹³⁴ See Gilson & Mnookin, *supra* note 52, at 564-565.

¹³⁵ On one occasion when I was attempting to lay out the process I had in mind, the other attorney suddenly brightened and said, "You want to mediate the case without a mediator." Because most attorneys have at least a nodding acquaintance with mediation, that may be as good a way as any to describe the problem-solving approach.

shape of the table can be time well spent, as shown by a study of construction mediation.

In 1990 the Forum on the Construction Industry undertook a survey of mediation and other forms of ADR in the construction industry. Based on 552 completed surveys, an analysis was done of the factors distinguishing those cases that settled in mediation from those that did not.¹³⁶ The amount in controversy, the length of the mediation, the perceived quality of the mediator, the number of different techniques used by the mediator, and the extent of discovery were all significant predictive factors.¹³⁷ The most significant factor, however, was a surprise:

Of all the variables in the model, the source of the mediation rules used (RULES.USED) was, by far, the best predictor of mediation settlement. If rules developed by the AAA, CPR, or some other institution (including the court) were used, settlement was significantly less likely to occur than when parties developed their own rules. One explanation might be that the process of developing the rules forms a critical prelude to the actual (and successful) mediation. If rules can be hammered out successfully between and among the parties, as opposed to accepting some prepared or standardized rules, the outcome seems already predetermined. . . . [C]ontrolling for other features of the process, *settlement is approximately five times more likely when parties develop their own rules.*¹³⁸

An explicit model of the problem-solving approach therefore not only helps to define the process, it can help to implement it. The model requires a certain amount of flexibility. Sometimes it may be counterproductive to create the “calm before the storm”—e.g., where injunctive relief may be needed and voluntary delay would undercut a claim of immediate, irreparable harm. The decision about which approach to use and who should serve as settlement counsel—indeed, whether to use settlement counsel at all—can be made only after assessing the costs and benefits in particular cases.

¹³⁶ See Henderson, *supra* note 21, at 127.

¹³⁷ See *id.* at 131.

¹³⁸ *Id.* at 145 (emphasis added).

VII. COST-BENEFIT ANALYSIS

A. *Disadvantage to Client: Increased Costs*

The primary potential disadvantage to use of separate settlement counsel is increased cost. There may be cases where the additional cost would prove prohibitive. For example, detailed knowledge of the client's business may be an absolute prerequisite to negotiation of an acceptable settlement. Trial counsel may already possess that knowledge, and there may be no other attorney available with a sufficient basis of information so that the additional details could be learned in short order. These cases should be very rare. Mostly the danger will be that the client will pay for duplicative efforts.

The problem of paying two lawyers for the same work is susceptible to control. When hired to resolve the case before litigation commences, settlement counsel should be careful to produce written work product to document efforts on the case. Trial counsel should receive, at a minimum, the beginnings of a trial notebook, including the following: (1) a case overview, listing likely theories of recovery, available defenses, and an estimate of the damages under each theory; (2) a detailed chronology; (3) a statement of material facts; (4) legal memoranda or photocopies of relevant cases; (5) copies of key documents; (6) a summary of settlement negotiations to date; and (7) a list of areas where additional information is required for a complete case evaluation. In addition, where witnesses have been interviewed or experts consulted, the notebook should include witness statements or notes of witness interviews and expert reports. Settlement counsel should be prepared to provide the above information on a computer disk in a generally accepted format—e.g., WordPerfect or Word. In a complex case, database or spreadsheet information should similarly be available. Settlement counsel will, of course, turn over any documents received by way of informal discovery from the opponent and will provide copies of documents given to the opponent.

Trial counsel should be able, within a short period of time, to absorb the information gathered by settlement counsel and do an independent assessment of case strengths and weaknesses. If settlement counsel has been efficient in gathering the information, the issue of cost duplication will involve how quickly trial counsel can get the benefit of the work already done. Using the approach outlined, the additional cost should be modest in most cases.

When a two-track method is used, both settlement counsel and trial counsel will be learning about the case simultaneously. Some cost savings might be achieved by letting settlement counsel rely upon facts gathered by

trial counsel, and vice versa, but this is likely to be inefficient. In order to deal with the issue of duplicative cost under a two-track approach, law firm consultant Peter Zeughauser has suggested a method whereby settlement counsel works on a contingent fee basis while trial counsel is paid on an hourly basis.¹³⁹ If settlement counsel is able to negotiate a settlement, a fee will be awarded based upon saved legal costs.

In general, settlement counsel lends itself to more flexible fee arrangements. For budget purposes, it should be easier to estimate the cost of an effort to settle than of full litigation. Use of settlement counsel adapts well to current notions of controlling costs by dividing the case into phases and using different fee structures for each phase.¹⁴⁰ Where the scope of work can be clearly defined, a fixed fee may be appropriate. Another billing method, unit pricing, gives the client some comfort that costs are under control, while not requiring prescience of counsel. Under this approach, the client will pay an agreed amount for defined units of work—e.g., interviewing a witness, drafting a demand letter, preparing a decision tree, and preparing for and conducting a settlement meeting. Actual cost will depend upon how many witnesses are interviewed, whether a decision tree is prepared, and so on. The client, by participating in the decision of what steps will be taken, has greater control over costs than in an hourly rate case. At the same time, the lawyer is not required to completely specify the scope of work in advance, as would be required under a fixed fee arrangement.

The client may wish to provide counsel with an incentive to settle the case and can do so by sharing savings over an agreed upon “resolution value.”¹⁴¹

¹³⁹ Zeughauser’s proposals are discussed in Peter D. Zeughauser, *Price & Product: A Proposal for a Focused ADR Structure*, 15 ALTERNATIVES TO HIGH COSTS LITIG. 141, 155 (1997), and in William F. Coyne, Jr., *Free Structure Questioned*, 16 ALTERNATIVES TO HIGH COSTS LITIG. 37, 38 (1998).

¹⁴⁰ See Robert E. Litan & Steven C. Salop, *More Value for the Legal Dollar: A New Look at Attorney-Client Fees and Relationships*, in ABA SATELLITE SEMINAR: VALUE BILLING: DOES IT WORK? 129, 162 (1993).

¹⁴¹ See F. Mark Kuhlmann, *Alternative Fee Arrangements: A Cost Control or a Process for Quality Results*, in ABA SATELLITE SEMINAR: VALUE BILLING: DOES IT WORK? 169, 177 (1993). I have used this sort of arrangement when acting as settlement counsel. A form agreement is published in Kuhlmann, *supra*, at 177. James McGuire of Brown, Rudnick, Freed & Gesmer, in a telephone interview with the Author, reported having used the same method and, in addition, has occasionally taken cases on a “double or nothing” approach. No fee is paid unless settlement is achieved, but if settlement is successful, the client pays twice the usual hourly rate. See Telephone Interview with James McGuire, Brown, Rudnick, Freed & Gesmer (May 26, 1998).

If an hourly rate agreement is used, it may be possible to achieve savings by use of a lower hourly rate, combined with a contingent bonus for successful settlement. As an incentive for litigators to refer work, settlement counsel may wish to devise an arrangement in which the litigator shares any bonus.¹⁴²

B. Benefits Where No Settlement Is Reached

The methods described above can minimize the additional legal expense from use of settlement counsel, but the expense cannot be eliminated. Even under a contingent fee arrangement, the client is responsible for the expenses incurred by settlement counsel. If settlement counsel fails to achieve a negotiated resolution, can settlement counsel still add value? Can that value equal or exceed what the client has spent? In many cases the answer will be yes.

For the reasons described above, use of settlement counsel can increase the prospect of eventual settlement. Misunderstandings may be cleared up, strengths of the other side's position may be appreciated, and the emotional temperature of the dispute may be lowered. All of these will facilitate later settlement efforts. In addition, the client has received a second opinion on relevant matters, including case evaluation and likely case costs. Use of settlement counsel may diminish litigation costs, even if the case goes to trial. By engaging in informal discovery, and by focusing on the critical issues, settlement counsel may make the litigation more efficient.

There are benefits for trial counsel as well. Settlement counsel has absolute immunity for actions in prelitigation investigations; communications with the client are privileged, and settlement counsel would be available to testify to prior inconsistent statements of witnesses without jeopardizing the client's ability to keep chosen trial counsel. If settlement counsel continues to bear responsibility for settlement negotiations, the client has a very credible "good-cop, bad-cop" tool. If trial counsel takes over settlement discussions, there is a different advantage—lowered client expectations. If settlement counsel has been effective, the client should now have a much more realistic appraisal of the value, or likely cost, of the case. It will be easier for trial counsel to discuss case weaknesses without risk to the working relationship, or to the long-term relationship.

Where the client has not retained trial counsel, settlement counsel may be able to assist in the selection. Settlement counsel may have knowledge or connections that would help the client to locate a trial attorney with

¹⁴² This approach was suggested in a telephone interview with Judge John Wagner, Irell & Manella (June 24, 1998).

appropriate expertise. Settlement counsel may also be able to assist the client in procuring the most advantageous fee arrangement with trial counsel, for example, in locating trial counsel who will handle the case on a contingent basis. Where the client does not already have in-house counsel, settlement counsel may, in effect, fill that role for a particular dispute.

C. When to Use Settlement Counsel

The cost-benefit analysis will differ with every case. However, there are some categories of cases which lend themselves to use of settlement counsel.

- When the dispute involves a contract which requires mediation before litigation, it is sensible to choose counsel who will take maximum advantage of this opportunity for settlement. Trial counsel will be sorely tempted to use early mediation as an opportunity to posture or to “see what the other side will offer.” Because parties are unlikely to mediate twice, this represents a significant lost opportunity.
- Where there is the potential of a continuing relationship between the parties, both sides have an incentive to resolve the dispute with a minimum of contentiousness.
- If the dispute is mostly about money, and mutual savings are possible through early settlement, the parties have an opportunity for a win-win resolution if they act quickly, before legal fees begin to mount. Most commercial disputes fall into this category. Where the costs of litigation will be significant compared to the amount in dispute, the case cries out for settlement counsel.
- Where there is a misunderstanding between the parties, settlement counsel is in a better position to clear up the confusion. It may not always be clear at the outset that misunderstanding is at the root of a dispute, but if there has been poor communication, or minimal communication between the parties, the possibility is worth exploring.

Conversely, there are some categories of cases in which using settlement counsel will likely prove counterproductive. Cases in which immediate action is required—e.g., cases involving threatened misappropriation of trade secrets—come to mind. In addition, where the other side will not negotiate in good faith, settlement counsel may needlessly run up costs. In such cases, settlement counsel may have a role to play, but only after trial counsel has been able to get the other side’s attention.

Not only the type of case, but the attitude and circumstances of the client, will determine if it makes sense to try settlement counsel. Where the client, after consideration of the options, is determined to pursue litigation to judgment, it would be a waste of time to retain settlement counsel. Conversely, where the client has decided to resolve the case by negotiation if possible, and where the existing attorney—in-house counsel, the transaction lawyer, or trial counsel—is capable of implementing the technique described earlier, there may be no need for a second attorney to pursue settlement.

In most cases, however, the client is not certain as to the best course, or the client and current advisor (in-house counsel, transaction attorney, accountant, or trial counsel) may disagree about the best course of action. In this situation, it makes sense to consider retaining settlement counsel. The following chart illustrates the range of possibilities. In the situations numbered 1 and 9, there may be little reason to consider the settlement counsel alternative. In the other seven situations—which have been shaded—the option of early settlement using settlement counsel ought to be considered. Moreover, where the client is not an individual, but a corporation, partnership, or other entity, there may not be unanimity among the decisionmakers. For example, the CEO may favor litigation while other officers have concerns about the outcome. In this situation, corporate counsel may welcome the support provided by outside counsel who can speak freely, and knowledgeably, about the pros and cons of litigation.

	Lawyer wants to litigate	Lawyer not sure	Lawyer wants to settle
Client wants to litigate	1	2	3
Client not sure	4	5	6
Client wants to settle	7	8	9

VIII. CONCLUSION

Courts, corporate clients, and society as a whole have focused on the problem of delay in resolving legal disputes. Unfortunately, the underlying premise for much of the effort to solve the problem is that trial lawyers should encourage settlement and should be chastised or sanctioned for failing to do so. The current approach ignores real constraints on lawyer behavior and expects lawyers to act against their self-interest. By hiring an experienced

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litigator, skilled in negotiation and ADR, to settle the case, the client brings the lawyer's duty and interest into alignment.

The model for settlement counsel presented here should produce better results in achieving early settlement. Settlement counsel has an advantage over trial counsel because of a narrower focus, a shortened time frame, and freedom to use problem-solving to the fullest. Settlement counsel has an advantage over transaction counsel because of litigation experience. Settlement counsel has an advantage over in-house counsel because of greater independence and frequently because of greater litigation experience as well.

The model is not just theoretical. Attorneys all over the country are already implementing it in various ways. Many other attorneys have indicated their willingness to embrace problem-solving and have proven their willingness to use mediation to resolve disputes.

I do not suggest use of settlement counsel as a panacea. However, for the ninety percent of civil cases which do eventually settle, using settlement counsel is a viable way to encourage them to do so sooner.

